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1420041 Ontario Inc. v. 1 King West Inc.

1420041 Ontario Inc., Plaintiff (Appellant) and 1 King West Inc., Defendant (Respondent)

Ontario Court of Appeal

E.A. Cronk J.A., G.R. Strathy J. (ad hoc), R.A. Blair J.A.

Heard: January 26, 2012
Judgment: April 20, 2012
Docket: CA C53690

Proceedings: Reversed, 2010 CarswellOnt 10089, 2010 ONSC 6671, 1 R.P.R. (5th) 33 (Ont. Div. Ct.); Reversed, 2010 CarswellOnt 939, 2010 ONSC 876 (Ont. S.C.J.)

Counsel: Paul D. Guy, Scott W. McGrath, for Appellant

Megan Mackey, for Respondent

Subject: Civil Practice and Procedure; Property

Civil practice and procedure.

Real property.

***R.A. Blair J.A.*:**

1 The issue raised on this appeal is whether — and, if so, in what circumstances — an individual condominium unit owner has the legal capacity to sue for relief relating to the common elements.

Background and Facts

2 1 King West is a high-rise condominium complex in downtown Toronto. It was promoted to be of the highest quality, designed to "provide the benefits and ambiance of a boutique hotel, a deluxe residence, and an executive office facility."

3 In 2000 and 2001, when the complex was still under construction, the appellant agreed to purchase eight units

from the respondent developer. Four of the units were to be furnished as required for participation in the short-term rental program offered by the condominium. The other four were to be constructed in a manner that would make them suitable for use as the appellant's head office. This involved a custom design and finishes unique to the appellant's units. The design included exterior doors, windows and walls that were to be installed in places not otherwise called for in the condominium plans. While constructed to meet the appellant's specific requirements, these exterior doors, windows and walls form part of the common elements of the condominium corporation.

4 After the building became available for occupancy in 2005, a disagreement arose between the parties over the adequacy of the common elements for the foregoing purposes. The appellant's main complaints centre around the exterior doors, windows and walls contemplated by the custom design and the alleged inability of the building's HVAC system to respond to the special heating and air conditioning demands of those configurations in the appellant's four "head office" units. The HVAC system also forms part of the condominium's common elements.

5 In November, 2005, the appellant commenced this action (the Individual Action), seeking specific performance of its agreement with respect to the custom design and finishes it claims the respondent promised or, in the alternative, an abatement of the purchase price or, in the further alternative, damages. Much of the claim concerns matters unrelated to the common elements.

6 At the same time, all was not well with the construction of the common elements elsewhere in the development. In March, 2007, the condominium corporation commenced an action (the Condominium Action) on behalf of itself and the individual unit owners, including the appellant, for common element deficiencies. It claimed damages against the respondent developer, the construction manager, the general contractor, the co-developers, the architects, the structural engineer, the mechanical engineer, the electrical engineer, and the City of Toronto. Notices were given to the individual unit owners under the *Condominium Act, 1998*, S.O. 1998, c. 19, s. 23(2) (the "Act"), advising that the condominium corporation intended to sue on its own behalf and on behalf of all unit owners for common element and construction deficiencies, and that the unit owners could opt out of the action if they wished to pursue their own action for damages to their units. The appellant did not opt out.

7 During the course of examinations for discovery in the Individual Action, the respondent took the position that certain of the appellant's complaints were in relation to the common elements and that the appellant did not have standing to pursue those claims because of s. 23(1) of the Act. The respondent brought motions to strike the appellant's claim on this basis and to stay the action on the basis that it duplicated the Condominium Action. The respondent was unsuccessful at first instance, but on appeal the Divisional Court granted the relief sought, dismissed the Individual Action as it related to the common elements, and stayed the remainder as it related to the appellant's individual units.

8 Since the appeal was launched, the Condominium Action has been settled. As a result, the issue regarding the stay is moot. Counsel agree that the only question for determination here is whether the appellant has standing to sue in relation to the common elements.

9 In the particular circumstances of this case, I would allow the appeal and reinstate the Individual Action.

Analysis

The Applicable Standard of Review and Principles of Statutory Interpretation

10 Whether s. 23(1) gives the condominium corporation exclusive standing to commence an action in relation to the common elements is a question of law. Counsel agree that the standard of review is correctness.

11 Nor is there any disagreement as to the applicable principles of statutory interpretation. In Canada today, the words of a statute are to be read in their entire context, and in their grammatical and ordinary sense harmonious with

the scheme of the Act, the object of the Act, and the intention of the legislature: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26.

Section 23(1)

12 Section 23(1) of the Act empowers the condominium corporation to bring an action on its own behalf and on behalf of the unit owners in certain circumstances, including in relation to the common elements. Section 23(1) states:

> Subject to subsection (2)[FN1], in addition to any other remedies that a corporation may have, a corporation may, on its own behalf and on behalf of an owner,
>
> (a) commence, maintain or settle an action for damages and costs in respect of any damage to common elements, the assets of the corporation or individual units; and
>
> (b) commence, maintain or settle an action with respect to a contract involving the common elements or a unit, even though the corporation was not a party to the contract in respect of which the action is brought.

The Issue

13 The central issue on the appeal revolves around the use of the word "may" in subsection (1). Is "may" mandatory, in the sense that it grants a condominium corporation the exclusive authority to pursue an action in relation to the common elements of that condominium? Or is it simply permissive, in the sense that it grants the corporation standing to bring such an action — a right that it would not otherwise have on behalf of individual unit owners at common law — without taking away the right of a unit owner to bring such a proceeding in appropriate circumstances?

Discussion

14 As the issue arises on this appeal, I am satisfied that s. 23(1) does not preclude the appellant from advancing its claim under the agreement of purchase and sale in relation to the common elements.

History and Purpose of s. 23(1)

15 Section 23(1)(a) of the Act gives a condominium corporation a broad power to sue on its own behalf and on behalf of the unit owners, not just with respect to common elements, but also with respect to the assets of the corporation and individual units. This power is broadened even further by s. 23(1)(b) which extends the right to sue even to contractual situations where the condominium corporation is not a party to the contract in question.

16 In *Condominium Law and Administration*, 2d ed., looseleaf (Toronto: Thomson Reuters, 1998) Vol. 2, at para. 22-1(c)(i), Audrey Loeb suggests that s. 23(1) and its predecessor, s. 14 of the *Condominium Act*, R.S.O. 1990, c. C.26, were enacted to overcome problems arising under the Act prior to 1978 where unit owners' attempts to bring representative actions against developers for construction deficiencies in units and/or the common elements had floundered. This was because of a line of jurisprudence holding that unit owners could not bring a class action in respect of damage to common elements: see, for example, *Loader v. Rose Park Wellesley Investments Ltd.* (1980), 29 O.R. (2d) 381 (H.C.J.).

17 The rationale underpinning that jurisprudence — in the era preceding the introduction of class action legislation in Ontario — was that a representative action could not be brought under former Rule 75 because s. 9(18) of the *Condominium Act* as it then existed already contained a statutory mechanism for a class action-like proceeding to be

brought by the corporation. The problem was that s. 9(18) was somewhat limited, providing as it did for an action with respect to the common elements only. Because the ownership of condominium units changes frequently, privity of contract problems frequently arose; and because the nature of construction and other condominium problems are not always confined solely to the common elements — as this case illustrates — this remedy could not always satisfy the full needs of unit owners.

18 Consistent with this intention, courts have given the condominium corporation's power to sue under s. 23(1) and its predecessor, ss. 14(1) and (2), a generous scope. In *York Condominium Corp. No. 420 v. Deerhaven Properties Ltd.* (1983), 40 O.R. (2d) 106 (H.C.J.), at p. 109, Griffiths J. said:

> In my view, s. 14(2) as remedial consumer legislation should not be rigidly or narrowly construed to the extent it confers on the condominium a right to sue. On that principle, I conclude it is reasonable to interpret the section as conferring on the corporation an unlimited right to sue with respect to common elements, and further extending that right by providing that an action in contract may be maintained by the corporation even though it was not a party to the contract.
>
> As I view s. 14 generally it seems to me that the obvious intention of the Legislature was not to restrict the broad power to sue previously held under s. 9(18) but rather to extend those powers by providing under s. 14(1) a right to sue and recover damages and costs in respect to not only the common elements but with respect to the assets and individual units of the corporation as well. By s. 14(2) as I have found the Legislature intended to confer a right to sue on contracts to which the corporation was not a party.

19 It does not follow, however, that simply because the legislature intended to afford the condominium corporation a far-reaching right to sue on its own behalf and on behalf of the unit owners in order to enhance the effectiveness of remedies that might be asserted on the owners' behalf, it intended at the same time to deprive those unit owners of rights of action they already had. The condominium corporation's action has a different premise. An important underlying tenet of s. 23(1) is its objective of protecting the interests of the condominium community as a whole, not the interests of individual unit owners in their capacity as individual unit owners. Rosenberg J.A. intimated as much in *Wellington Condominium Corp. No. 61 v. Marilyn Drive Holdings Ltd.* (1998), 37 O.R. (3d) 1 (C.A.), at p. 19, where he said:

> The primary responsibility of the corporation is to manage the assets. It also has a duty to control and administer the common elements and the assets and has the power to own and acquire real property for the use and enjoyment "of the property" (s. 13(1)). Most importantly, s. 14(2) of the Act provides that the corporation may sue on its own behalf with respect to the common elements "even if the corporation was not a party to the contract in respect of which the action is brought". *These provisions manifest a legislative intention that the corporation be entitled to recover damages where the real injury is to the owners as a group rather than to any individual.*
>
> [Emphasis added.]

20 With the foregoing principles and considerations in mind, I turn to the interpretation of s. 23.

Section 23 Does Not Deprive The Appellant Of Its Right To Sue In Respect Of The Common Elements

21 What s. 23 is designed to do, in my opinion, is to empower a condominium corporation to bring an action where there is a "common" condominium issue to be addressed — where, as Rosenberg J.A. put it in *Wellington*, "the real injury is to the owners *as a group rather than to any individual*" (emphasis added). Such a remedy, broad as it is, is not inconsistent with the right of an individual unit owner to pursue contractual or other claims that are unique to the owner's unit, including those touching on common elements that immediately pertain to the unit and that do not concern the owners as a group. Indeed, such a right complements the class action-like remedy provided by s. 23(1).

22 Respectfully, the Divisional Court made three errors when it concluded that s. 23(1) granted exclusive standing to a condominium corporation to sue in relation to the common elements. First, although it acknowledged the appellant was seeking "to have the exterior doors and windows in its units repaired and finished in accordance with what it says the agreement was with respect to the construction of those doors and windows," the Divisional Court treated the appellant's claim primarily as a claim for damages in relation to those unfulfilled promises. Secondly, it placed too much emphasis on the nature of the proprietary regime governing common element ownership under the Act, and on the package of responsibilities imposed on condominium corporations to deal with the common elements set out therein. Thirdly, it failed to recognize the illogical conclusion to which its reasoning leads: an individual unit owner would be deprived of the right to sue even with respect to the owner's individual unit, a long-recognized right of the owner: see Loeb, at para. 22-1(c)(i).

23 As mentioned above, it is true that the courts have given the condominium corporation's powers to sue under s. 23 a liberal interpretation in recognition of the need for an effective remedy on behalf of the owners as a group and in recognition of the important managerial responsibilities imposed upon the corporation in relation to the common elements. And, as the respondent submits, this approach is supported by the common-element ownership and common-element responsibility regime as framed in the Act. While an owner is entitled to exclusive ownership of his or her unit, the owner holds an interest as a tenant-in-common in the common elements along with all the other unit owners (s. 11(1) and (2)). The jointly-owned units may not be partitioned or divided (s. 11(5)), and a unit owner may only modify common elements without the permission of the board in limited circumstances (s. 98). At the same time, primary responsibility for the common elements rests with the condominium corporation: the corporation is obliged to maintain the common elements (s. 90(1)), to repair them (s. 89) and to insure them (s. 99); and it is entitled to make additions, alterations or improvements to the common elements in many cases without notice to the unit owners (s. 97).

24 The upshot of all of this is — so the respondent submits — that the unit owner has no right to repair the doors and windows, or the HVAC system adjacent to the owner's unit, and therefore the only reasonable interpretation of s. 23(1) is that it affords a condominium corporation exclusive standing to bring an action regarding the common elements. I disagree.

25 The appellant is not asserting a proprietary claim in relation to the common elements. Nor is its claim essentially a claim for damages. The appellant is asserting a contractual claim to compel specific performance of obligations pertaining uniquely to its own units and to common elements immediately pertaining to those units.

26 This is not immediately clear from a reading of the pleadings themselves, but, as counsel explained to us during argument, the "big ticket" items of the appellant's claim in relation to the common elements concern the following issues:

(a) the location of walls and doors in the design layout for the appellant's suites (some of the contested locations concern walls and doors that form part of the common elements);

(b) the location of exterior windows (all exterior windows in the building are of the same type, but the design plan called for windows in the appellant's units to be located in different places than was the case for other units, e.g., one office was to have had a window providing access to a balcony, but there was no window or balcony — both common elements);

(c) the suitability of the HVAC system providing air to the appellant's units (because of the particular configuration of the appellant's windows, there are contested problems concerning the system's capacity to work in tandem with windows that seal in air).

27 These are not claims for "damage to common elements," as contemplated by s. 23(1) of the Act. Indeed, there has been no "damage to common elements." They are claims to rectify the failure to construct common elements immediately pertaining to the appellant's units as the developer allegedly agreed to do in the first place. In this respect, the proprietary characteristics of common element ownership and the overall responsibilities of the condominium corporation towards the common elements, as formulated under the Act, are of limited relevance and the emphasis of the respondent and the Divisional Court on them is misplaced.

28 In my opinion, the word "may," as employed in s. 23(1), is permissive; it is not mandatory. By that I mean that it empowers the condominium corporation to sue on its own behalf and on behalf of all unit owners in relation, amongst other things, to common element deficiencies, but it does not require that *any* action touching the common elements *must* be brought by the condominium corporation. Put another way, s. 23(1) *does not take away a right or deny standing* to individual unit owners; it *grants* a right that the condominium corporation would not otherwise have, namely the *standing (but not the exclusive standing)* to sue on behalf of the unit owners in relation to the common elements.

29 This interpretation is consistent with the *Rizzo Shoes* principle of statutory interpretation. It corresponds with the grammatical and ordinary meaning of the language used: "may" is generally permissive; "shall" is mandatory. It is an interpretation that is harmonious with the intent of the legislature and the scheme and object of the Act. As I have explained, s. 23 provides an effective mechanism whereby the condominium corporation and the unit owners may pursue a resolution of common problems affecting the condominium complex in an effective manner, without a multiplicity of proceedings, while at the same time permitting individual owners to pursue claims respecting the common elements immediately pertaining to their units in appropriate circumstances — both of which objects complement the consumer protection nature of the Act.

30 A statute should not be interpreted as taking away a right of action unless it is explicit in doing so. The interpretation I favour is also consistent with this principle. It is well-established that in cases of ambiguity, where a statute is capable of more than one reasonable interpretation but one of those interpretations would serve to restrict a citizen's right of action, the court should give effect to the interpretation that least restricts that right: see *Berardinelli v. Ontario Housing Corporation*, [1979] 1 S.C.R. 275, at p. 280; *Ukrainian (Fort William) Credit Union Ltd (In Liquidation) v. Nesbitt, Burns. Ltd.* (1998), 36 O.R. (3d) 311 (C.A.), at p. 320, leave to appeal to S.C.C granted, [1997] S.C.C.A. No. 672, declared moot January 18, 1999; *Telecommunication Employees Association of Manitoba Inc. v. Manitoba Telecom Services Inc.*, 2007 MBCA 85, 214 Man. R. (2d) 284, at para. 97; and *Campbell Estate v. Fang* (1994), 155 A.R. 270 (C.A.), at para.10.

31 Section 23(1) does not explicitly deprive a unit owner of the right to sue in respect of the common elements affecting the owner's unit.

32 The respondent contends that the "strict construction" approach is no longer appropriate, given the decision of the Supreme Court of Canada in *Canada 3000 Inc. (Re)*, 2006 SCC 24, [2006] 1 S.C.R. 865. I disagree. *Canada 3000* does not change the principle that, where there is ambiguity as to the meaning of a provision, courts may resort to presumptions such as strict construction. As Binnie J. clarified, at para. 84, it is only where there is an ambiguity that such additional techniques of statutory construction apply.

33 Here, ambiguity abounds in s. 23(1). It is not clear whether the legislature intended the word "may" to grant a condominium corporation the exclusive right to sue with respect to the matters delineated in s. 23(1), or whether it merely granted the condominium corporation the standing to do so without limiting the right of the unit owner to sue in respect of those matters as well. The well-argued positions of both counsel here attest to that tension and, as we shall see, courts have expressed differing opinions as well. It is therefore appropriate in these circumstances to apply the "strict construction" approach to the interpretation of a provision that affects the individual unit owner's right of action.

34 It makes sense for a condominium corporation to be empowered to bring an action where there is a common condominium issue to be addressed, rather than leaving it to individual unit owners, alone or collectively, to pursue their remedies as owners of an undivided interest in the common elements — with the potentially unwieldy consequences of such an option. The power minimizes the risk of a multiplicity of proceedings and furnishes a mechanism whereby the condominium corporation and the unit owners can effectively pursue claims relating to the common elements through one vehicle. The third party contract provision in s. 23(1)(b) makes it clear that such an action cannot be defeated on privity of contract grounds by an argument that the action concerning the common problem may have aspects to it that relate to individual units or that arise out of a contract in respect of the common elements or a unit to which the condominium corporation was not a party.

35 For the reasons I have articulated, however, it does not follow that, if what is at issue is a contractually unique problem or other unit-specific wrong raising a discrete issue relating to common elements immediately pertaining to the unit, the unit owner is precluded from pursuing such a claim by reason of s. 23(1).

36 This interpretation is reinforced by a consideration of the logical consequences of the respondent's argument. If a condominium corporation has the exclusive right under s. 23 to pursue all claims for damages and costs in relation to the common elements (s. 23(1)(a)), and to pursue all contractual claims respecting the common elements, whether a party to the contract or not (s. 23(1)(b)), it must also by the same provisions have the exclusive right to do the same thing with respect to individual units, to the exclusion of the unit owners no matter what the claim. This is because the condominium corporation's standing to sue under s. 23 is not limited to the common elements; it extends to actions concerning the assets of the corporation, the individual units, and third party contracts "involving ... a unit" (s. 23(1)(b)).

37 Put in the context of this case, the appellant would not have standing even to sue the respondent developer for the damages it says it has sustained with respect to the interior of its exclusively owned "individual units" because only the condominium corporation may pursue "an action for damages ... in respect of ... individual units" (s. 23(1)(a)). In addition, the appellant's action would be blocked because only the condominium corporation could commence, maintain or settle "an action with respect to a contract involving ... [the appellant's] unit, even though the corporation was not a party [to the contract]" (s. 23(1) (b)).

38 Such a result would be absurd.

39 For that reason, the jurisprudence has correctly characterized the condominium corporation's power under s. 23 as one that is triggered by a problem common to the condominium as a whole and to the owners as a group, rather than by a problem that is primarily related to a particular unit. The appellant's concerns are primarily related to its particular units.

40 In this respect as well, I think it is noteworthy that the power of the condominium corporation to commence, maintain or settle an action is not a power to do so only on behalf of an owner (or owners); it is a power to take steps "on its own behalf and on behalf of an owner." This bolsters my view that, whatever the action is, it must be an action with broader implications for the condominium community as a whole.

41 The respondent argues that to interpret s. 23(1) to permit individual unit owners to pursue their own claims respecting the common elements will lead to a multiplicity of proceedings and create the prospect of double recovery on the part of the unit owner. I am not persuaded these possibilities pose a sufficiently serious problem to justify barring a unit owner from a right of action.

42 One of the purposes of the s. 23(1) proceeding is to minimize a multiplicity of proceedings and, for practical purposes, it will do so where the nature of the common element claim involves a problem that affects the condominium community as a whole. Nor is there likely to be an explosion of proceedings where a unit owner is seeking —

as here — to pursue a remedy that is contractually unique to the unit or that deals with some other unit-specific wrong raising a discrete issue relating to common elements immediately pertaining to the unit.

43 The respondent contends that, if the appellant is permitted to pursue its claim with respect to the common elements and recovers damages, it will have recovered those damages twice, since the Condominium Action has settled and the damages recovered are deemed by s. 23(4) to be assets of the corporation — a corporation of which the appellant is a member. Section 23(4) states:

> A judgment for payment in favour of the corporation in an action that the corporation commences or maintains on its own behalf is an asset of the corporation.

44 I disagree. First, it is too broad to say that assets recovered by the condominium corporation for damages to the common elements are deemed to be assets of the corporation. Section 23(4) only deems a judgment for payment in favour of the corporation to be an asset of the corporation to the extent that the action is *on its own behalf*. It does not say that is the case where the action is brought *on behalf of an owner*. Thus, there may well be a difference between "corporate" damages recovered in relation to the common elements and "individual" damages. It follows that the deemed corporate asset contemplated in s. 23(4) may not be the duplicate of any damages recovered by the individual unit owner regarding the common elements. Secondly, to the extent there is a risk of such double recovery for the same damages in the case of competing proceedings, the remedy of a stay of proceedings is available to guard against such an eventuality.

45 Finally, in support of its position that the condominium corporation has the exclusive right to pursue any action in relation to the common elements, the respondent argues that a unit owner precluded from bringing an action with respect to the common elements is not without a remedy. It points to the availability of both an action against the condominium corporation for failure to maintain the common elements, and the oppression remedy. Neither of these options provides a suitable alternative, in my view.

46 In the circumstances here, there has been no failure to maintain the common elements; the complaint is that the relevant common element features were not constructed as agreed in the first place. Nor is an oppression remedy claim an alternative to the type of wrong being asserted in this type of case. An oppression remedy calls for certain, often onerous, criteria to be met — quite different from the threshold a claimant must meet when asserting a contractual or other unit-specific wrong based claim.

47 I would not give effect to these arguments raised on behalf of the respondent.

Existing Jurisprudence

48 There is no authority in Ontario bearing directly on this issue. Counsel referred us to three cases, however: *Hamilton v. Ball*, 2006 BCCA 243; *Kelly v. Reardon* (2004), 234 Nfld. & P.E.I.R. 358 (N.L. Prov. Ct. (Sm. Cl. Div.)); and *Loader v. Rose Park Wellesley Investments Ltd.* None is binding or directly on point.

49 *Kelly v. Reardon* is readily distinguishable. Unlike Ontario's Act, Newfoundland and Labrador's comparable legislation at the time contained mandatory language, stating in s. 12(6) that:

> An action with respect to, arising from, or relating to a common element shall be brought by or against the corporation in its own name ...

50 *Loader* is referred to earlier in these reasons. It is also distinguishable. The issue before the court was different than the issue concerning us here. *Loader* determined that individual purchasers of condominium units could not bring a representative action for construction deficiencies against the builders of a condominium complex under former

Rule 75 because the *Condominium Act* in force at the time already contained a statutory mechanism for a class action-like proceeding to be brought. Section 9(18) of that Act provided that "[a]ny action with respect to the common elements may be brought by the corporation and a judgment for the payment of money in favour of the corporation in such an action is an asset of the corporation."

51 *Loader* did not deal with, and did not decide, that an individual unit owner could not bring an independent action regarding common elements. It was decided under an earlier incarnation of Ontario's condominium legislation and at a time when there was no class action legislation in place in Ontario. It was a decision particular to its time and to the procedural landscape that existed at that time.

52 *Hamilton v. Ball* is more helpful. It arose in the context of condominium legislation similar to Ontario's. In British Columbia the condominium corporation is known as a "strata corporation." Section 171(1) of the *Strata Property Act*, S.B.C. 1998, c. 43, Part II contains the type of permissive language found in the Ontario Act:

> The strata corporation may sue as representative of all owners, except any who are being sued, about any matter affecting the strata corporation, including any of the following matters:
>
> . . . . .
>
> (b) the common property or common assets; ...

53 The British Columbia Court of Appeal held that the words "may sue" did not give a strata corporation exclusive authority to pursue claims involving common elements. In this regard, Newbury J.A. said, at para. 27:

> As for the notion that individual owners should not be permitted to "circumvent" s. 171 and sue directly for injury or damage to their interest in common property, I see nothing in the Act taking away that right, which I view not as statutorily created, but as a common law incident of the ownership of property, albeit a type of property unknown to the common law. Section 171 creates a mechanism by which a three-fourths majority of owners may use the strata corporation as their vehicle for suing and spread the expenses thereof. But in the words of Seaton J.A. in *Strata Plan No. VR 368 v. Marathon Realty Co.* (1982) 41 B.C.L.R. 155 at para. 14, "that is as far as the legislation goes." It would take much clearer language, in my respectful view, to remove the right of individual owners to enforce their rights "on their own hook".

54 These comments can be applied comfortably to the language of s. 23(1) of the Ontario legislation, in my opinion. I would simply add that here the appellant's claim is asserted not so much as "a common law incident of the ownership of property," but as an exercise of its contractual rights *vis-à-vis* the respondent.

Disposition

55 Section 23(1) of the *Condominium Act* grants a condominium corporation standing (but not exclusive standing) to commence, maintain or settle the types of action referred to therein. Properly interpreted, it does not preclude an individual condominium unit owner from pursuing a claim relating to common elements where what is at issue is a contractually unique problem or other unit-specific wrong raising a discrete issue relating to common elements immediately pertaining to the owner's unit.

56 I would, accordingly, allow the appeal, set aside the order of the Divisional Court and reinstate the appellant's action in Court File No. 05-CV-300372PD3 as it relates to the common elements.

57 The appellant is entitled to its costs before the Divisional Court, fixed in the amount of $13,000.00 including

HST, and to its costs of the motion before Stewart J., fixed in the amount of $4,500.00 including HST. By agreement, the costs of this appeal are fixed in the amount of $15,000.00 inclusive of all applicable taxes, payable by the respondent to the appellant.

***E.A. Cronk J.A.*:**

I agree

***G.R. Strathy J.*, (ad hoc):**

I agree

FN1 Subsection (2) is not relevant to these proceedings.

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