In the Court of Appeal of Alberta

Citation: Calgary Jewish Academy v Condominium Plan 9110544, 2014 ABCA 279

Date: 20140908
Docket: 1301-0088-AC
Registry: Calgary

Between:

The Calgary Jewish Academy

Appellant (Plaintiff)

- and -

The Owners: Condominium Plan 9110544

Respondent (Defendant)

The Court:

The Honourable Mr. Justice Clifton O'Brien
The Honourable Mr. Justice Brian O'Ferrall
The Honourable Mr. Justice Alan Macleod

Memorandum of Judgment of
The Honourable Mr. Justice O'Brien and
The Honourable Mr. Justice Macleod

Memorandum of Judgment of The Honourable Mr. Justice O'Ferrall
Concurring in the Result

Appeal from the Order by
The Honourable Madam Justice C.A. Kent
Pronounced on the 4th day of March, 2013
Filed on the 3rd day of April, 2013
(2013 ABQB 134, Docket: 1201-03910)

Memorandum of Judgment

The Majority:

[1] We agree with O'Ferrall J.A. that this appeal must be allowed. We come to this conclusion, however, by a somewhat different path. For purposes of our analysis we accept the facts as set out in our colleague's judgment.

[2] Here the subject Condo Corp lease was duly registered in the South Alberta Land Titles Office. The provisions both of the *Condominium Property Act*, RSA 1980, c C-22 and of the *Land Titles Act*, RSA 1980, c L-5 are applicable and entitle the appellant, as lessee, to the estate or interest granted by that instrument.

[3] The subject lease in this instance was registered pursuant to an order made my Egbert J on April 16, 1991, upon the application of the respondent. Section 54 of the *Land Titles Act*, formerly section 57, provides:

> So soon as registered every instrument becomes operative according to its tenor and intent, and on registration creates, transfers, surrenders, charges or discharges, as the case may be, the land or the estate or interest in the land or estate mentioned in the instrument.

[4] In short, once registered, this provision gives effect to the instrument according to its terms: *Devenish v Connacher*, [1930] AJ No 44, [1930] 2 DLR 973, at paras 34-37; *Brown v Norbury* [1931] AJ No 71, [1931] 4 DLR 507, per Harvey CJA at para 4.

[5] Further, provided a certificate has been completed and presented in accordance with subsection 40(4) of the *Condominium Property Act*, subsection 40(5) precludes any attack upon the validity of the subjects set out in the certificate. These subsections state:

> (4) The Registrar shall not register a transfer or lease authorized under this section unless it has endorsed on it or is accompanied by a certificate under the seal of the corporation stating
>
> (a) that the unanimous resolution was properly passed
> (b) that the transfer or lease conforms with the terms of it, and
> (c) that all necessary consents were given.
>
> (5) The certificate referred to in subsection (4) is,
>
> (a) in favour of a purchaser or lessee of the common property, or part of it, and
> (b) in favour of the Registrar,
>
> conclusive proof of the facts stated in the certificate.

[6] The expression "conclusive proof" is used frequently in statutes and creates an irrebuttable presumption obliging a fact finder to reach a certain conclusion. For example, the use of that expression relating to certificates made pursuant to the *Guarantees Acknowledgement Act*, RSA 2000, c G-11, s 5, has been interpreted to mean that such a certificate is conclusive proof that that *Act* has been complied with: *Central Trust Company v Abugov*, 1990 ABCA 142, 107 AR 226 at para 10; *Lambert v Caisse Populaire de Morinville Savings & Credit Union Ltd.*, 1984 ABCA 73, 58 AR 113.

[7] The certificate under the seal of the condominium company was provided to the Registrar. The respondent, therefore, cannot challenge the unanimous resolution by saying it was not properly passed. Nor can it assert that the lease does not conform with the terms of the unanimous resolution, nor that not all the necessary consents were given.

[8] The respondent submits this approach is not appropriate in the case of condominium corporations because condominiums are creatures of statute and subject to the principles of *ultra vires*. This means the certificate in this case cannot stand as it is based upon a nullity. In our view, however, subsections 40(4) and (5) mean what they say. They apply specifically to condominiums and are designed to protect the Registrar, and a lessee, from having to go behind a certificate to determine if it is valid. Once a certificate has been provided to the Registrar, in the process of registration, there is no need for either the Registrar or the lessee to determine whether the condominium corporation has actually done what it asserts to have done in the certificate.

[9] For these reasons, we conclude the appeal must be allowed and the subject lease declared to be valid.

Appeal heard on December 03, 2013

Memorandum filed at Calgary, Alberta
this 8th day of September, 2014

C.J. O'Brien

O'Brien J.A.

C.J. O'Brien for Macleod J.

Authorized to sign for: Macleod J.

Memorandum of Judgment Concurring in Result

O'Ferrall J.A.:

[10] This is an appeal from a chamber judge's declaration that a certain lease between the Calgary Jewish Academy (the School) and The Owners: Condominium Plan 9110544 is invalid. The School sought the declaration that a 1991 lease between it and the owners of the condominium was valid and enforceable. The owners took the position that the granting of the lease was *ultra vires* the condominium corporation which executed the lease because not all those with an interest in the property had consented to the disposition or had approved the lease's execution as required by section 40(2) of the then *Condominium Property Act*, RSA 1980, c C-22 (now section 49(2) of the *Condominium Property Act*, RSA 2000, c C-22).

[11] The chambers judge concluded that the lease was *ultra vires* and therefore unenforceable: *Calgary Jewish Academy v Condominium Plan 9110544*, 2013 ABQB 134, [2013] AJ No 219.

Background

[12] The parties are neighbours on land adjacent to Glenmore Trail. The construction of the interchange at 14 Street and Glenmore Trail S.W. in the 1970's cut off emergency access to the School. The City of Calgary (City) owned lands adjacent to the School and leased part of them to the School for parking, pedestrian access, emergency vehicle access and landscaping. That lease was entered into in December of 1978 and was registered by way of caveat against the City's title about a decade later as Registration No. **891 208 466** (City Lease). No one argues validity of the City Lease.

[13] The City Lease was a lease of several distinct portions of the property owned by the City. It had a five-year term, but was renewable at the option of the School. Any such renewals were to include a further right to renew. The rent was $1.00 per year. The stated purposes of the lease was for the parking of motor vehicles, landscaping, direct pedestrian access to and from the school and for emergency access for motor vehicles. The lease could be cancelled if the lands were no longer required for the School. The City covenanted to construct a parking lot on some of the leased land. The lease was terminable by the City if the lands were needed for municipal purposes.

[14] In 1989, the City sold its land to a developer, Statesman Villas Ltd. (Statesman), which proposed to develop a condominium complex on it. The development permit for the condominium was approved by the City of Calgary on the condition that the developer and "any subsequent owner" erect a 1.8-meter (6-foot) high screen fence "around the parking area designated for the school use". In order to comply with the development permit condition, Statesman wished to enter into a new lease with the School. The School accommodated; and a new lease between the School and Statesman was executed in October 1990 (Statesman Lease), apparently on substantially the same terms as the City of Calgary Lease. The Statesman Lease

was registered against the land by way of caveat bearing Registration No. **901 279 068** on November 8, 1990. The School's caveat claiming an interest under and by virtue of the City Lease remained on title notwithstanding the registration of the caveat claiming an interest on behalf of the school under and by virtue of the Statesman Lease. No one questions the validity of the Statesman Lease.

[15] When the condominium plan was registered pursuant to the *Land Titles Act,* RSA 1980, c L-5, on March 19, 1991, the caveat claiming an interest under and by virtue of the City Lease was discharged and the Statesman Lease caveat was noted on all the titles to the condominium units as Registration No. **901 279 068**. This registration was required by section 5(1) of the *Condominium Property Act* which provided that on registering a condominium plan, the Registrar is to cancel the certificate of title to the parcel described in the plan and issue a separate certificate of title for each unit described in the plan and any interests affecting the parcel noted on the cancelled certificate of title are to be endorsed on the new certificates of title issued.

[16] Because it considered that this arrangement might create conveyancing difficulties, Statesman preferred to have the School's lease registered on the condominium plan against the common property and not on each individual condominium unit's title. However, by the time that decision was made, the condominium plan had already been registered and the Registrar of Land Titles refused to register the Statesman Lease against the common property on the basis that it might constitute a subdivision of those lands, thereby contravening the *Planning Act* as it then was, now section 652(1) of the *Municipal Government Act*, RSA 2000, c M-26, which prohibits the Registrar accepting for registration any instrument which has the effect of subdividing a parcel of land unless the subdivision has been approved by the subdivision approving authority.

[17] Statesman once again asked the School to execute a new lease, this time with the condominium corporation. The School once again accommodated Statesman by executing a new lease (the Condo Corp Lease) on terms substantially identical to the prior City and Statesman Leases, although an option to purchase the leased lands in favour of the School appears to have been added, either in the Statesman Lease which was not provided to us, but certainly in the Condo Corp Lease. The effect of this addition will be dealt with later in this judgment.

[18] I have characterized the School's willingness to execute new lease documents as accommodating the requests of Statesman because the original lease to the School (the City Lease) was renewable so long as the School required the lease and because the evidence at trial was that there was never any doubt that the School would be exercising its options to renew.

[19] In any event, a court order was required to get the Condo Corp Lease registered against the Condominium Plan. Court orders directing the Registrar of Land Titles to register an instrument he had previously refused to register are not routinely granted. Presumably the justice who ordered that registration did so on the basis either that the Condo Corp Lease did not effect a subdivision, the lands having long-since been leased to the School by the City, of that approval of the subdivision was implicit in the grant of the lease by the subdivision approving authority.

[20] The owner of all the condominium units at the time the Condo Corp Lease was executed was Statesman. The only member of the condominium board of directors at the time the Condo Corp Lease was executed was the president of Statesman. He certified that a unanimous resolution by the owner of the condominium units approving the lease on April 10, 1991 had been properly passed. Two days later (April 12, 1991) the condo corporation's corporate seal was affixed to the lease. And it was on April 16, 1991 that the Court of Queen's Bench order permitting Condo Corp Lease to be registered by way of instrument against a portion of the condominium's common property was granted.

[21] Having received court approval, the Condo Corp Lease was registered against the common property on April 17, 1991 as Registration No. **911 076 848.** The registration was recorded on the "Condominium Additional Plan Sheet Certification." At the same time, the caveats filed against the condominium unit titles claiming an interest under and by virtue of the Statesman Lease were discharged.

[22] Registration of the Condo Corp Lease was done by way of instrument, not by way of caveat, so there could be no questioning of the interest being claimed as there can be when interests in land are notified by way of caveat. A caveat, of course is simply notice of an interest being claimed. In and of itself, a caveat does not create an interest in land. An instrument, as defined in section 1(k) of the *Land Titles Act* creates an interest in land. The effect of registration of an instrument is prescribed in section 54 of the *Land Titles Act.*

> 54 So soon as registered every instrument becomes operative according to its tenor and intent, and on registration creates ... the land or the estate or interest in the land or estate mentioned in the instrument.

[23] As indicated above, the registration of the Condo Corp Lease was endorsed on a document known as the "Condominium Additional Plan Sheet Certificate" which the Registrar is permitted to add the condominium plan pursuant to section 10(1) of the *Condominium Property Regulation,* Alta Reg 168/2000 made pursuant to the *Condominium Property Act:*

> 10(1) The Registrar may add additional sheets to a condominium plan on which may be made any endorsement, registration, memorandum, notification or other entry that is to be or may be made on the plan.

[24] The certificate of title to each unit in the condominium states that "additional registrations may be shown on the Condominium Additional Plan Sheet". A former version of that notification stated that title was "subject to the ... interests notified by memorandum underwritten or endorsed ... on the condominium plan".

[25] Statesman began selling units in the complex in early 1991 before some of these registrations had taken place, in other words, before there were units to sell. Certificates of title to the units Statesman was selling had yet to be created. Two of the buyers who purchased units in the condominium bought during this time frame. It was their evidence, given by way of affidavit, upon which the owners of the condominium relied. Those two owners were Ms. Smith and Ms. Francis. Particulars of their sales follow.

The Smith Sale

[26] On January 15, 1991, Ms. Smith entered into an agreement with Statesman, the then owner of the lands upon which the condominium units were being constructed and its developer, to purchase a unit in the condominium. The condominium was under construction at the time. Specifically Ms. Smith offered to purchase and Statesman agreed to sell "a unit of the VILLAS AT GLENMORE GREEN CONDOMINIUM PROJECT, which unit was municipally described as 38 Glenmore Green S.W. and legally described as:

> CONDOMINIUM PLAN N/R
> UNIT 9
> AND SIX HUNDRED AND TWENTY FIVE UNDIVIDED ONE TEN THOUSANDTHS SHARE IN THE COMMON PROPERTY"

[27] By virtue of section 6(2) of the *Condominium Property Act*, the common property of a condominium is held by the owners as tenants in common. So when a buyer buys a unit in a condominium, he or she also buys an undivided interest in the common property. However, when Ms. Smith agreed to buy a unit, the condominium plan had not been registered and therefore the legal description in her purchase agreement did not include the condominium plan number.

[28] There were few provisions in the purchase agreement with respect to the state of the title at closing. There was no covenant by the vendor to convey clear title. There was an acknowledgement by the purchaser that the condominium plan had not yet been registered. A copy of the proposed condominium plan purported to be attached to the purchase agreement as a schedule, but this Court was not provided with a copy of the attachment. The condominium plan was registered about two months after the purchase agreement was entered into, namely on March 19, 1991. In other words, there was no condominium when Ms. Francis agreed to buy a unit in it.

[29] Significantly, it was a term of Ms. Smith's agreement that title to the unit might be encumbered with a caveat in favour of the School claiming an interest under the City Lease.

> TITLE, ENCUMBRANCE AND BY-LAWS
>
> 13) The unit is sold subject to the Act, and the implied easements thereunder and any caveats, charges, restrictive covenants, encumbrances and any easements registered or to be registered in favour of utility companies or public authorities, and the proposed restrictive covenant set forth in Schedule "I" and any charges or encumbrances the source of which is attributable to the Purchaser. The Purchaser expressly acknowledges and agrees that the title to the Unit, when transferred to the Purchaser, may be subject to a Caveat registered by the Calgary Jewish Academy as Instrument No. 891208466 or to another instrument registered by or on behalf of the said Calgary Jewish Academy and relating to the same or similar subject matters as set forth in the said Caveat. The Vendor will, after receipt of

> the full sale proceeds, cause any of its mortgage encumbrances attributable to the Vendor to be discharged insofar as they are registered against title to the Unit ...

[30] One of the schedules to the purchase agreement also purported to attach a list of existing encumbrances against the title to the lands upon which the condominium unit was being constructed (Lot 1, Block A, Plan 1790AM). We were not provided with a copy this schedule to the purchase agreement.

[31] With respect to the state of title at the time Ms. Smith executed her sales agreement (i.e., before the condominium plan was registered), the certificate of title to the land upon which the condominium units were being constructed showed both the City Lease, which had been on title since October 13, 1989 as Registration No. **891 208 466** and the Statesman Lease which had been on title since November 8, 1990 as Registration No. **901 279 068**. So, Ms. Smith had notice that some of the lands upon which the condominium units were being erected were leased to the School.

The Estoppel Certificate

[32] Section 39(6) of the *Condominium Property Act* states that upon the application of a purchaser, a condominium corporation must certify, among other things, the amount of any contributions or assessments owing in respect of the unit being purchased. By convention, this is typically done by way of an estoppel certificate. Section 44 of the *Condominium Property Act* states that on the written request of a purchaser of a unit in a condominium, the condominium corporation must provide the purchaser with certain other information prescribed in section 44.

[33] Several months after Ms. Smith entered into the agreement to purchase a unit, she was provided with an "Estoppel Certificate" which certified the amount of assessments and provided some information which section 44 required to be supplied if requested. It stated that the common property of the condominium had not been leased. The relevant portions of the Estoppel Certificate are set out below:

> ESTOPPEL CERTIFICATE
>
> THE OWNERS: CONDOMINIUM PLAN NO. 9110544
> GLENMORE GREENS
> CALGARY, ALBERTA
>
> TO WHOM IT MAY CONCERN: DATED: April 29, 1991
>
> RE: LEGAL UNIT 9, CIVIC 38
>
> Further to your application or request for a statement concerning the status of the subject Unit, we hereby certify that:

A. Current contributions or assessments determined as the contribution of the owner for the subject Unit are $150.89 per month.

B. The said contribution is payable to us on or before the 1st day of each month.

C. The owner of the subject Unit has paid all contributions and assessments due and payable as of the date of this Certificate.

NOTE: Estoppel Certificate subject to payments clearing bank.

FURTHER STATEMENTS AND PARTICULARS

We wish to advise (but not certify) for your further information only, that to the best of our knowledge and belief:

1. ...

9. The common property of The Condominium has not been transferred or leased and with the exception of implementing the By-Laws relating to the assignment of parking spaces and privacy areas to individual units, no resolutions to transfer or lease the common property have been passed by The Corporation either pursuant to Section 41 of the Condominium Property Act or otherwise. ...

THE OWNERS: CONDOMINIUM PLAN NO. 9110544
By its Contract Manager
CONDOMINIUM FIRST MANAGEMENT SERVICES LTD.

(emphasis added)

[34] As indicated above (paragraphs 16 to 21), several weeks before the estoppel certificate was issued, the condominium corporation had executed the Condo Corp Lease with respect to the same lands as had been leased to the School by the City. The Condo Corp Lease was executed by the condominium corporation on April 12, 1991 and registered April 17, 1991. The Estoppel Certificate was issued by the condo board management company on behalf of the condominium corporation on April 29, 1991. No explanation was provided to the court for the statement in the Estoppel Certificate that the common property had not been leased, although there may have been one.

[35] In any event, the certificate of title to the lands, of which Unit 9 (Ms. Smith's unit) eventually became a part, showed both the City Lease and the Statesman Lease when the purchase agreement was entered into. At closing, the certificate of title to Unit 9 showed Ms. Smith's title subject to "additional registrations [as] may be shown on the condominium additional plan sheet". By then the Condominium Additional Plan Certificate showed the Condo Corp Lease registered. Title to Unit 9 was transferred to Ms. Smith on June 11, 1991. Title was taken by Ms. Smith without objection.

The Francis Sale

[36] Ms. Francis also entered into an agreement "for the sale of newly constructed condominium together with an interest in land". Ms. Francis' purchase agreement was dated March 6, 1991. It was accepted by the vendor, Statesman, on March 12, 1991. So Ms. Francis' purchase agreement, like that of Ms. Smith, was entered into prior to registration of the condominium plan. The proposed condominium plan purported to be attached to the sale agreement, but this Court was not provided with a copy of that attachment.

[37] Again, there were few provisions in the purchase agreement with respect to the state of the title at closing. There was no covenant by the vendor to convey clear title. Indeed, in Ms. Francis' purchase agreement, the purchaser expressly acknowledged that the vendor might not be able to give title on possession if the condominium plan was not then registered. There was no condominium in existence when Ms. Francis agreed to buy a unit in it. As to the state of the title when it was given, clause 13 provided as follows:

> TITLE, ENCUMBRANCE AND BY-LAWS
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> The Unit is sold subject to the Act, and the implied easements thereunder and any caveats, charges, restrictive covenants, encumbrances and any easements registered or to be registered in favour of utility companies or public authorities, and the proposed restrictive covenant set forth in Schedule "F" and any charges or encumbrances the source of which is attributable to the Purchaser. The Vendor will, after receipt of the full sale proceeds, cause any of its mortgage encumbrances attributable to the Vendor to be discharged insofar as they are registered against title to the Unit. The Purchaser acknowledges that he is fully aware of the permitted and conditional uses of the Unit and real property within the surrounding area under the land use by-laws of the City of Calgary and all applicable statutes, rules and regulations of any competent authority and agrees to accept the Unit subject to the risks incidental to such uses. The Purchaser further acknowledges that his is acquainted with the duties and obligations of an owner of a Unit and the Purchaser understands that he will be a member of the condominium corporation of the Project and will be subject to all the benefits and obligations inherent in such membership. The Purchaser agrees to be bound by the proposed by-laws for the Condominium Corporation, a copy of which is attached as Schedule "E" hereto.

[38] Ms. Francis was also provided with an Estoppel Certificate dated April 29, 1991 identical to that provided to Ms. Smith, indicating that the common property of the condominium had not been leased and no resolutions to lease the common property had been passed.

[39] When Ms. Francis executed her purchase agreement, the certificate of title to the lands, of which the unit she agreed to purchase (Unit 13) formed a part, had both the City Lease and the Statesman Lease registered against it by way of caveat. Ms. Francis' purchase agreement also purported to have attached to it a schedule of existing encumbrances which presumably would

have included a description of those leases. We were not provided with that attachment, but Ms. Francis is taken to have had notice of what was registered on the certificate of title.

[40] When title to Ms. Francis unit was transferred to her on July 7, 1991, the condominium plan, to which her title was expressly subject, showed the Condo Corp Lease and no objection was taken to title by Ms. Francis on closing.

Chambers Judge's Decision

[41] The chambers judge held that the Condo Corp Lease was *ultra vires* because there had been no compliance with section 40 (now section 49) of the *Condominium Property Act*. In other words, because section 40 was not complied with, she held that the lease was invalid. Indeed, she held it was void *ab initio*.

[42] Section 40 of the *Condominium Property Act* required that a lease of common property be approved by a unanimous resolution passed at a properly convened meeting of the corporation. It also required the board to have received the written consent of those having an interest in the property. For ease of reference, those subsections provided (with emphasis added):

> 40(1) By a unanimous resolution a corporation may be directed to transfer or lease the common property, or any part of it.
>
> (2) When the board is satisfied that the unanimous resolution was properly passed and that all persons having registered interests in the parcel and all other persons having interests, other than statutory interests, notified to the corporation
>
> > (a) have, in the case of either a transfer or a lease, consented in writing to the release of those interests in respect of the land comprised in the proposed transfer, or
> > (b) have, in the case of a lease, approved in writing of the execution of the proposed lease,
>
> the corporation shall execute the appropriate transfer or lease.
>
> (3) A transfer or lease executed in accordance with subsection (2) is valid and effective without execution by any person having an interest in the common property and the receipt of the corporation for the purchase money, rent, premiums or other money payable to the corporation under the terms of the transfer or lease is a sufficient discharge of and exonerates the persons taking under the transfer or the lease from any responsibility for the application of the money expressed to have been so received.
>
> (4) The Registrar shall not register a transfer or lease authorized under this section unless it has endorsed on it or is accompanied with a certificate under the seal of the corporation stating
>
> > (a) that the unanimous resolution was properly passed,
> > (b) that the transfer or lease conforms with the terms of it, and

(c) that all necessary consents were given.

(5) The certificate referred to in subsection (4) is,
(a) in favour of a purchaser or lessee of the common property, or part of it, and
(b) in favour of the Registrar,
conclusive proof of the facts stated in the certificate.

(6) On the filing for registration of a transfer of common property, the Registrar
(a) shall, before issuing a certificate of title, amend the condominium plan by deleting from it the common property comprised in the transfer, and
(b) shall register the transfer by issuing to the transferee a certificate of title for the land transferred, but no notification of the transfer shall be made on any other certificate of title in the register.

(7) On the filing for registration of a lease of common property, the Registrar shall register the lease by noting it on the condominium plan in the manner prescribed by the regulations.

[43] The trial judge's reasons were based on the premise that when Smith and Francis executed their purchase agreements, they became persons "having interests" in the land comprised in the Condo Corp Lease. She found that, as purchasers, Ms. Smith and Ms. Francis had not consented to the disposition, nor had they approved the lease's execution. The absence of the consents and approvals led the chambers judge to conclude that there was no authority to enter into the Condo Corp Lease: para 10. The Condo Corp Lease was therefore *ultra vires* the condominium corporation which made it a "nothing" according to the chambers judge: para 19.

[44] Section 40(5) of the *Condominium Property Act* provided that a certificate under the seal of the condominium corporation certifying that the necessary unanimous resolution directing the corporation to lease the common property was properly passed, that the lease conformed to the terms of the special resolution and that all necessary consents were given, was conclusive proof of the facts stated in the certificate. However, the chambers judge held that since the lease was *ultra vires* of the condominium corporation for failure to obtain the approval in writing of the execution of the lease of all those having interests in the common property, the lease was a nothing and could not be cured or validated by the statutory presumption that the facts set forth in the certificate were conclusively proven (para 19).

The Arguments on Appeal

[45] The School submits that the chambers judge erred in law by: (a) failing to give effect to subsection 40 (5) of the *Condominium Property Act*; (b) finding that the Condo Corp Lease was *ultra vires*; and (c) failing to recognize the authority of the Registrar of Titles under the *Land Titles Act*, RSA 2000, c L-4. Further, the appellant asserts the "chambers judge made palpable and overriding errors in relying on the affidavit of evidence of [Francis and Smith] to conclude

that they had not consented to the granting of [Condo Corp Lease] to the Appellant, and in finding that the lease was executed prior to, and not after, the resolution authorizing execution of the [Condo Corp Lease] by the members of the [Condo Corp].

[46] The owners argue that the chambers judge considered subsections 40(4) and (5) of the *Condominium Property Act* and adopted the proper approach - that is that condominium corporations lack the powers of natural persons and are creatures of statute. Therefore, they can only undertake actions authorized by the *Condominium Property Act*. The respondent states that a developer simply executing a certificate referenced in subsections 40(4) and (5) of the *Condominium Property Act* could not bind the owners of the condominium and its common property if the requirements of subsection 40(2) had not been adhered to. The owners submit that the chambers judge properly reviewed the evidence and applied the correct jurisprudence in concluding that the formalities of the *Condominium Property Act* were not complied with and that the Condo Corp Lease was therefore *ultra vires* the respondent.

Analysis

[47] While I concur completely with the reasons of the majority, I believe this dispute could also have been decided by applying the fundamental principle governing our Torrens system of land titles, namely that purchasers of real property subject to prior dispositions validly made take title subject to those dispositions. On this basis, I believe this appeal should be allowed and the Condo Corp Lease declared valid.

[48] This Court has held that "nothing in the *Condominium Property Act*... in any way undermines the indefeasibility provisions so clearly expressed in, and which underly, *the Land Titles Act* of Alberta": *Adler Furman & Associates Ltd. v. Condominium Plan CDE 13442* , 1985 ABCA 1, [1985] AJ No 699.

[49] This Court has also said that we "should be slow to accept any unnecessary disruption of the anchor principle of the Torrens system, indefeasibility. A concomitant principle should command me to interpret strictly any statutory exception to indefeasibility unless to do so would do violence to the evident object of the derogation": *Petro-Canada Inc v Shaganappi Village Shopping Centre Ltd* (1991), 109 AR 237, 76 Alta LR (2d) 162.

[50] Indefeasibility of title is an essential feature of the *Land Titles Act*:

> 62(1) Every certificate of title granted under this Act ..., so long as it remains in force and uncancelled under this Act, is conclusive proof in all courts as against ... all persons whomsoever that the person named in the certificate is entitled to the land included in the certificate for the estate or interest specified in the certificate ... except as against any person claiming under a prior certificate of title granted under this Act or granted under any law heretofore in force relating to titles to real property in respect of the same land.

[51] The learned chambers judge found that the lease executed by the condominium corporation was *ultra vires* of the condominium corporation because the requirements of section

40 of the *Condominium Property Act* were not compiled with. The lease was a "nothing" to use her words.

[52] In a sense, the Condo Corp Lease was a "nothing". It was merely the substitution of a new party to a prior disposition, a novation, so to speak. And that is why compliance with section 40 was not necessary.

[53] Section 40 applies to transfers or leases of the common property by the condominium corporation.

[54] There was no lease given or granted by the condominium corporation because the common property (or that portion of it required for the parking lot, pedestrian access, emergency vehicle access and landscaping) had long-since been leased or granted to the School, certainly before the condominium corporation, or even the developer of the condominium project, had taken title to the property, and certainly long before the owners of the condominium units entered into their purchase agreements. Furthermore, the registration of this prior lease was notified on the certificate of title to the lands the condominium owners agreed to purchase and on the certificates of title which were ultimately conveyed to them without objection.

[55] The trial judge's error was in proceeding on the basis that the condominium corporation granted a lease to the School. The condominium corporation had no interest in land to lease. Its only interest in the property was that of owning the reversion. Neither did Statesman grant a lease to the School. It too had no property interest in the leased lands beyond that of the reversion.

[56] On the evidence before the trial judge, the execution of the Statesman Lease took place at a time when the City of Calgary Lease came up for renewal at the option of the School. There was no need for a new grant. All the School had to do was indicate its election to renew. The Statesman Lease was apparently executed because Statesman's development permit required it and any subsequent owners to take steps to protect the school's parking area. The Condo Corp Lease was executed because Statesman wished the School's lease noted on the condominium plan as opposed to the titles to the condominium units. On both occasions the School accommodated the requests to simply execute new documents reflecting its existing leasehold interest.

[57] The City Lease was not discharged from Statesman's title until the condominium plan was registered, at which time Statesman became the registered owner of all the units in the condo. All of Statesman's titles were subject to the Statesman Lease until April 17, 1991 when the Condo Corp lease was registered against the condominium plan, which registration was reflected on the "Condominiums Additional Plan Sheet Certificate" registered at Land Titles and available for inspection.

[58] In *Condominium Plan No. 992 5204 v Carrington Developments Ltd*, 2004 ABCA 243, 354 AR 371, upon which the trial judge relied, the condominium corporation, when it was controlled by its developer, entered into an agreement with the developer giving the developer exclusive use of the condo's outdoor parking stalls which the developer sold separately to

purchasers of the condominium units. The exclusive use agreement was characterized as a lease of a portion of the common property to which section 40 of the *Condominium Property Act* would apply. But in *Carrington*, there was no prior disposition of the common property before the condominium corporation acquired it. Here there was a lease which had been in place for more than a decade and which was renewable at the lessee's option, so long as it was required for school purposes. So there was no disposition by the condominium corporation when it executed the Condo Corp Lease simply for the purpose of cleaning up the certificates of title to each unit in the condominium.

[59] Furthermore, section 40 is only engaged when there are persons having an interest in the property being disposed of. As a developer and the first owner of all the units in the condominium, Statesman had no interest in the property which had already been disposed of (namely the leasehold interest). Likewise, the condo corporation had no interest in the leasehold interest which had been disposed of prior to it taking title. And the owners of condominium units who purchased from Statesman also had no interest in that part of the common property which had been leased to the school long before the condominium project was even contemplated.

[60] Section 40 was not engaged. It need not have been complied with.

[61] But assuming section 40 was engaged and needed to be complied with, I am of the view that it was complied with.

[62] Section 40 permitted the board of directors of a condominium corporation to direct the transfer or lease of the common property or any part of it by unanimous resolution passed at a properly-convened meeting of a corporation (now a special resolution passed by 75% of the members of the condominium corporation is required).

[63] The trial judge was provided with a document which purported to certify that a unanimous resolution by 100% of the owners of the condominium plan had approved the execution of the Condo Corp Lease. At the time of the resolution, Statesman, owned all of the units in the condominium. The resolution directed the sole member of the board (Statesman's president) to execute a lease between the corporation and the School for a lease of a portion of the common property. The sole member of the board, Statesman's president, signed the certificate. He did this on April 10, 1991.

[64] Two days later, on April 12, 1991 the corporate seal of the condominium corporation was affixed to the Condo Corp Lease in the presence of the sole member of the condominium's board of directors in compliance with the unanimous resolution.

[65] Section 40(2) of the *Condominium Property Act* required that the board of directors of the condominium corporation had to be satisfied that an appropriate special resolution was properly passed and that all persons having registered interests in the parcel (presumably, the common property being leased) and all other persons having unregistered interests of which the corporation had notice have consented in writing to the disposition of the interest in the land in question.

[66] The respondent argued that those interested did approve the execution of the Condo Corp Lease which was no more than a substitute for the existing lease.

[67] I agree. The only parties which had registered interests in the common property of the condominium at the time of the passage of the special resolution was Statesman, which owned all the units, and the School, whose leases (the Calgary Lease and the Statesman Lease) were registered against the common property. Clearly those two parties consented to the lease.

[68] The only parties which the evidence disclosed had unregistered interests in the common property were Ms. Smith and Ms. Francis. Ms. Smith expressly agreed that the title to her unit might be either subject to the Calgary Lease or another instrument registered by or on behalf of the School relating to the same or similar subject matters. Ms. Francis may also be taken to have approved execution of the substitute lease when she executed her purchase agreement having had notice, by virtue of the caveat on title, of the Calgary Lease and having not rescinded the agreement within 10 days after its execution as she was entitled to do under section 9(3) of the *Condominium Property Act.*

[69] So I conclude that if section 40 was engaged, there was compliance.

Conclusion

[70] The Condo Corp Lease was registered against the common property on April 17, 1991 and appeared on the Condominium Additional Plan Sheet Certificate. Smith and Francis were tenants-in-common of the common property as noted on their certificates of title. Registration of the lease occurred about two months before Ms. Smith acquired title to her unit and approximately three months before Ms. Francis took title to her unit. And years prior to either Ms. Smith and Ms. Francis entering into their purchase agreements, the lease of the parking lot, and of the land required by the School for pedestrian access, emergency vehicle access and landscaping was granted to the School and registered against title to the land upon which the condominium project was registered.

[71] On the basis of the evidence adduced by Ms. Smith and Ms. Francis, it was clear that purchasers of units in this condominium, by operation of the *Land Titles Act*, were alerted to the prior leasing of the common property, whether such lease was registered against the undivided property (i.e., the pre-condominium parcel), against each unit (post-condominium plan registration) or against the common property (following the April 16 court order directing the Registrar to register it). The owners' interest in land is therefore subject to the claims of the lessee, the School.

[72] The Torrens system assures indefeasibility of title. Nothing in the *Condominium Property Act* undermines this principle, not even an erroneous estoppel certificate. As this Court stated some two decades ago, disrupting this anchor principle is only permissible in very limited circumstances.

Caveat

[73] Speaking only for myself, it should be made clear that the foregoing reasoning applies only with respect to the disposition of the leasehold interest. The original lease to the School by the City of Calgary granted a leasehold interest (it may have also granted easements but those grants are irrelevant to the appeal). The lease was renewable so long as the land was required for school purposes. However the Condo Corp Lease also contains the grant of an option to purchase the leased lands which, of course, was the grant of a different interest in the land.

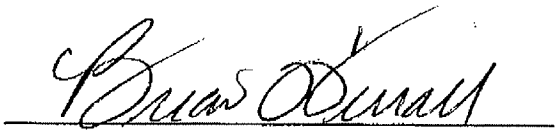
[74] An option to purchase was not part of the original lease granted by the City of Calgary of which Ms. Smith and Ms. Francis had notice. Whether there was a grant of an option to purchase in the Statesman Lease, of which Ms. Smith and Ms. Francis also had notice, we do not know because we were not provided with a copy of that lease.

[75] An option to purchase in a lease is a disposition of an interest in the reversion. The owners of the condominium units may have had an interest in the reversion when that option to purchase was granted. We are unable to determine whether they did or not. As indicated, we were not provided with a copy of the Statesman Lease and therefore do not know whether it granted the School an option to purchase. If it did not, then compliance with section 40 may have been required if the option to purchase was first granted in the Condo Corp Lease. The record simply does not contain enough information to rule on the validity of the grant of the option to purchase or to rule on compliance with section 40 or on the need for such compliance in connection with the option to purchase.

[76] Subject to the foregoing, I too would allow the appeal, set aside the decision of the chambers judge and declare the Condo Corp Lease valid.

Appeal heard on December 03, 2013

Memorandum filed at Calgary, Alberta
this 8th day of September, 2014



O'Ferrall J.A.

Appearances:

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J.M. McDougall
for the Respondent