In the Court of Appeal of Alberta

Citation: The Owners: Condominium Plan No. 822 2630 v. Danray Alberta Ltd., 2007 ABCA 11

Date: 20070122
Docket: 0503-0341-AC
Registry: Edmonton

2007 ABCA 11 (CanLII)

Between:

The Owners: Condominium Plan No. 822 2630

Respondent (Plaintiff)

\- and -

Danray Alberta Ltd., Danny Taran

Appellants (Defendants)

\- and -

Linda Milton, Donna Daly, Ken Charters, Darcy Milnthorp, Jeanne Cummins, Al Milton, Jim Allan, Sylvia Hortie, Corrine Urch and Debbie Ellis

Respondents (Third Parties)

\- and -

Lisa Johnson and James Butler

Respondents (Third Parties)

\- and -

Michael Lee

Respondent (Third Party)

\- and -

John Doe No. 1 and John Doe No. 2

Defendants (Not Parties to the Appeal)

\- and -

584090 Alberta Ltd., Re/Max Real Estate (Edmonton) Ltd., Sheldon Wolanski and Mark Kornell

Third Parties (Not Parties to the Appeal)

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Carole Conrad
The Honourable Madam Justice Marina Paperny

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Memorandum of Judgment

Appeal from the Judgment by
The Honourable Madam Justice D.A. Sulyma
Dated the 21st day of June, 2005
(2005 ABQB 455, Docket: 9703 06875)

Memorandum of Judgment

The Court:

I. Introduction

[1] The appellants, Danray Alberta Ltd. (Danray) and its principal Danny Taran (Taran), appeal a trial judge's decision finding they owed fiduciary duties to the purchasers of individual condominium units in "Whispering Pines" – a condominium development in Edmonton.

[2] Whispering Pines was built in 1982, registered as a condominium plan, but operated as a rental property. Danray purchased the development in 1988 and continued to rent the individual units. In 1994, Danray sold Whispering Pines to 584090 Alberta Ltd. (Newco) which then sold the individual condominium units to the public.

[3] The Board of Whispering Pines (the Board) soon discovered that repairs needed to be made to the roof, decks and furnace rooms. It made the repairs and then, approximately two years later, sued Newco and two real estate agents who had marketed the units alleging fraudulent concealment and breach of statutory and fiduciary duties. It also sued Danray and Taran for breach of fiduciary duties owed to the purchasers of the individual units at the time the property was being sold by Newco.

[4] The plaintiff's claims against Newco and the realtors were abandoned before trial. The lawsuit proceeded against Danray and Taran with Newco, the realtors, and several members of the Board being named as third parties. The trial judge concluded that Danray and Taran owed a fiduciary duty to the purchasers of the individual units to ensure an adequate reserve fund was established prior to the closing of the sale to the numbered company. She awarded damages in the sum of $180,000 and dismissed the claims against the third parties. Danray and Taran appeal.

II. Issue

[5] The issue in this case is whether Danray and/or Taran owed a fiduciary duty to the individual purchasers of the condominium units to ensure that an adequate reserve fund was established and maintained.

III. Decision

[6] In our view, the trial judge erred in law by finding that Danray and Taran owed fiduciary duties to the individual purchasers of condominium units. Contrary to the findings of the trial judge, neither Danray nor Taran owed fiduciary obligations as owner-developers because they could not be characterized in this way on a proper reading of the statute and on the facts of the case. In all essential respects, the condominiums were beneficially owned, marketed, and sold by Newco.

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[7] Furthermore, fiduciary obligations did not arise out of the reasonable expectations of the parties. There was no finding and no evidence to support a finding of a mutual understanding that either Danray or Taran, or both, would abandon self-interest to act on behalf of the purchasers. The individual purchasers bought the premises from Newco on an "as it stands" basis. Individual purchasers were advised of the correct amount in the capital reserve replacement fund (the reserve fund), and there was no basis for them to assume that Danray and Taran would be acting on their behalf in this transaction.

[8] Finally, we conclude that Taran did not breach his fiduciary obligations to the corporation as a director. He acted honestly and in good faith for the 26 days he served in that position. There was no statutory obligation on him to maintain a reserve fund and his failure to do so does not give rise to personal liability in the circumstances.

[9] We allow the appeal and set aside the order for damages.

IV. Background

A. The Facts

[10] The appellant, Taran, is a Montreal businessman and one of Danray's principals. In 1988, Danray decided to purchase a condominium development in Edmonton called "Whispering Pines". Although the original owner of Whispering Pines had registered a condominium plan, none of the 53 units in the development had ever been sold. When construction was completed in 1982 the units were rented out.

[11] Danray purchased the land and residential structures and continued to operate the development as a rental project. In the fall of 1993, a realtor named Mark Kornell (Kornell) approached Taran to ask if Danray would be interested in getting involved in a joint venture to sell the individual condominium units. Taran replied that Danray was not interested in a joint venture but would be prepared to sell the entire property.

[12] Negotiations took place, and on January 19, 1994 Danray accepted a written offer to purchase Whispering Pines for $3,317,800 (the sale agreement) from Kornell and another Re/Max realtor, Sheldon Wolanski (Wolanski), both of whom were acting on behalf of a numbered company to be incorporated later. Eventually Newco became the purchaser. The purchase price was based on the sale of all 53 units – $65,500 for the three-bedroom units and $59,095.83 for the two-bedroom units.

[13] Newco needed to finance the purchase through the sale of the condominium units. Danray agreed, subject to deposits being made in a timely fashion, and the parties established a closing date of August 1, 1994 for the final payment. In the meantime, Danray agreed to continue to manage the lands "in the same manner as it did prior to acceptance" and to deliver the lands on closing "in the

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same physical condition" as they were on the date of acceptance, normal wear and tear excepted (articles 6.1(h) and (i)). Danray also committed itself to agree to "perform all tasks required in order for the Condominium Corporation to be able to grant binding estoppel certificates for each Condominium Unit and to perform such other acts as required in order to complete the sale of the Lands as contemplated by this Agreement" (article 6.1(q)).

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[14] The sale agreement gave Newco the ability to inspect the property for maintenance deficiencies, and was conditional upon the purchaser and his professional advisors being fully satisfied, before closing, with "reports for the Lands, including without limitation, environmental, mechanical, electrical, plumbing and structural inspections" (article 5.1(c)(iii)). In addition, article 16.1(b) of the agreement gave Newco the right to insist that Danray:

> Maintain and pay for all improvements required to be performed on the Lands prior to the Closing Date as a prudent owner of similar property would (i.e. including without limiting the generality of the foregoing, repair and replace defective hot water tanks, appliances, furnaces and decks).

[15] Furthermore, if these repairs were not made, prior to closing, article 16.2 provided that the purchaser was entitled to make the repairs and the purchase price would then be reduced by the cost of making them.

[16] Finally, Newco acknowledged in article 17 of the sale agreement that it was responsible for establishing and maintaining a reserve fund. It agreed to set aside $300 per unit sold.

[17] The numbered company paid the necessary deposits and began marketing the condominium units. The parties to each purchase contract were Newco and the purchaser of the individual unit. Neither Danray nor Taran was involved. As well, Newco set the price for the individual units. The only influence Danray had upon the setting of the price was the requirement, found in article 7.2(a) of the sale agreement, that units could not be sold for less than the price which Newco paid Danray for the individual units. This was designed to give Danray some assurance that it would not be penalized with respect to its mortgage because of the way the sale was being financed. Under the purchase contract placed in evidence Newco made a profit of approximately $13,000.

[18] The purchase agreements signed by the individual purchasers contained the proviso that each purchaser agreed to accept the property "as it stands" and stated further:

> The purchaser has inspected the property and agrees that neither the vendor nor the agent has made any representation, warranty, collateral agreement or condition regarding the property or any adjacent lands or lands in close proximity to the property or otherwise which may in any way directly or indirectly affect the property or regarding the contract other than what is written in this contract.

[19] Newco, and its own property manager, prepared a new set of bylaws and a budget – both of which were distributed to potential purchasers of the condominium units. The new bylaws did not require the condominium corporation to establish and maintain a reserve fund. These documents were also forwarded to Taran. Neither Danray nor Taran played any part in creating these documents.

[20] On July 5, 1994, in furtherance of its commitment to Newco to perform all tasks necessary to facilitate the sale of the individual units, Danray passed a special resolution replacing the statutory bylaws with the new ones. Danray also appointed Taran to the Board of the corporation. Taran's only acts as a director were to sign the new management agreement with Newco's management company, Argon, and to authorize the signing of the estoppel certificates as required by the sales agreement. The estoppel certificates contained no misrepresentations regarding the state of the reserve fund. No issue was ever taken with the appointment of Argon as the new property management company.

[21] On July 13, 1994, Wolanski wrote to Danray with a list of maintenance deficiencies Newco wished to have corrected before the closing of the sale agreement on August 1st. The list included repairs to the roof, decks and furnace rooms. Taran sent this on to Dianne Anderson (Anderson), who worked for Danray's management company in Edmonton. She assessed the request and replied that the estimated cost of fixing the wooden structures was approximately $1,750. She also confirmed the need for roof repair, but suggested that the roof repairs should be done by the purchasers, with an appropriate adjustment in the purchase price to avoid any "subsequent liability that may be associated with having only completed part of the repairs." Danray and Newco then negotiated a figure to resolve Danray's obligations under the repair clause (article 16.1.b) of the sales agreement. The maintenance issues were eventually resolved when the parties agreed to reduce the purchase price by $2,200.

[22] The parties agreed that Danray would execute the transfers directly to the individual purchasers, undoubtedly to avoid double registration costs. The transfers were registered on July 26, 1994.

[23] On August 1, 1994, Taran resigned from the Board of the corporation and the sale from Danray to the numbered company closed. Wolanski was appointed a director of the corporation. At this point Newco transferred $15,900, which was being held in trust by its solicitors, into the reserve fund. On September 7, 1994, the new condominium corporation held its first general meeting and the unit owners approved the annual budget and appointed the Board.

[24] The Board encountered problems with rotting decks, leaking roofs and ice damning in spring. Some repairs were made, and some initial estimates secured. It was not until 1996, however, that the Board hired Gregory Holmes of Western General Contracting Inc. to give advice about immediate repairs. He replaced several of the decks and recommended repairs to the roof. In 1997, the Board hired Wade Engineering to do a reserve fund study to determine how much needed to be

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in the reserve fund to pay for all the repairs necessary to properly maintain the units and common property. Wade Engineering concluded the corporation should have had $447,336 in the reserve fund in 1994. In response to the reserve study, the Board asked the unit holders to put more money in the reserve fund. By the time all of the recommended repairs had been made, several years later, the estimated cost, according to the respondents, was approximately $480,644.

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[25] On behalf of itself, and the individual unit holders, the corporation sued the numbered company and the two realtors, Kornell and Wolanski, alleging fraudulent concealment and breach of statutory and fiduciary duties. It also sued Danray and Taran for breach of fiduciary duty. Prior to trial, it abandoned the claims against Newco and the two realtors, choosing to proceed only against Danray and Taran. Danray and Taran issued third party notices against Newco, Kornell, Wolanski, and several of the condominium owners who had been members of the Board after August of 1998. The third party action against Wolanski, was abandoned before trial.

B. The Trial Judgment

[26] The trial judge reviewed the evidence and concluded that the sale of the condominium units by the numbered company to the individual unit holders was really a sale by Danray to the public, made through an intermediary. Because of this, both Danray and Taran were "developers" as that term is defined in the *Condominium Property Act,* R.S.A. 1980, c. C-22 (as amended to January 16, 1992) (the *Act*) and subject, therefore, to the *Act*'s public protection provisions.

[27] Having made this finding, the trial judge went on to base her decision on breach of fiduciary duty. Her decision that Danray and Taran were involved in a direct sale to the public, caused her to conclude that Danray and Taran owed a fiduciary duty to the unit holders, based upon the statute and the bylaws, to ensure the condominium corporation established and maintained a proper reserve fund. She found Danray's obligation arose in January of 1994, at the time the purchase agreement was negotiated, when it was agreed that Danray would continue in its role as "a *de facto* Board from that time until the date of closing." The trial judge found Taran's fiduciary obligation arose on July 5, 1994 when he became a director of the condominium corporation and "became personally responsible for establishing and maintaining a proper reserve fund." To establish a legal basis for making these decisions, the trial judge stated at para. 137 of her reasons:

> I note that Stevenson J.A. in *Condominium Plan Number 752-1207 v. Terrace Corp.* substantially agreed with the comments of Wilson J.A., in *York Condominiums* at 467:
>
> > ...I do not think the position of the owner-developer remains unchanged after he starts to sell units. **I think that at that point he has committed the character of the project to that of condominium under the Act and declaration.** I think he has also placed himself in a fiduciary relationship to

> the unit purchasers not only with respect to their units but also with respect to the interests appurtenant thereto. He therefore holds the property in trust for the unit purchasers, present and prospective, and for the condominium corporation which will come into being upon registration of the declaration. **I believe he is under a duty to protect the interests of all unit holders, present and prospective, and cannot put his own interests in conflict with theirs even although he himself continues to be an owner as long as any units remain unsold.** [emphasis by trial judge]

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[28] The trial judge found that both Danray and Taran knew about maintenance problems with the roof, furnace rooms, and decks at the time the units were marketed to the public. She determined that the reserve fund established by the parties was inadequate to deal with the problems. She concluded that both Danray and Taran had breached their fiduciary duties and awarded damages against Danray and Taran, jointly and severally, in the amount of $180,000. She did not find any liability under the third party notices.

V. The Standard of Review

[29] The standard of review for errors of law is correctness. For errors of fact, or mixed fact and law, the standard is palpable and overriding error. (*Housen v. Nikolaisen*, 2002 SCC 33, 2 S.C.R. 235)

VI. Positions of the Parties

A. The Appellants

[30] The appellants advance four grounds of appeal:

1. That the trial judge erred in law by finding an obligation on an owner or developer under the *Act* to establish a reserve fund.

2. That the trial judge misunderstood the law of fiduciary duty by imposing a duty on the appellants absent a "mutual understanding that one party has relinquished its own self interest and agreed to act solely on behalf of the other party" (see: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at para. 33 (S.C.C.)).

3. That the trial judge made an error of mixed fact and law misconstruing the appellants' position under the sales agreement and by finding the appellants were "developers" under the *Act*.

4. That the trial judge made a variety of errors of fact, and mixed fact and law, that amount to palpable and overriding error.

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[31] During oral argument the appellants chose to focus on the second argument – that the trial judge misunderstood the law of fiduciary relationships as set out in *Hodgkinson.* The appellants submitted there was no evidence to indicate that purchasers of the condominium units had any expectation that either Danray or Taran would act solely on their behalf and, as a result, the trial judge erred in finding Danray and Taran were fiduciaries.

B. The Respondents

[32] The respondents submit that Danray and Taran were involved in the sale of the individual units. Because of this, they were developers under the *Act* who owed fiduciary duties to the purchasers of the individual condominium units. In support of this submission the respondents suggest the agreement between Danray and Newco was an unusual one in which the transfer of property from Danray to Newco was only notional. Thus, at the time the individual units were sold, Danray was still the owner and developer. The respondents point out that both Danray and Taran knew of the condition of the condominiums and the common property. Because of this they had a duty to inform potential unit holders of the deficiencies and to ensure there was enough money in the reserve fund, at the time the individual units were sold, to make the necessary repairs.

VII. Analysis

A. The Legal Framework

[33] To assess the merits of this appeal it is necessary to refer briefly to the principles of fiduciary duty. In *Hodgkinson*, La Forest J. suggested there are two common ways in which a fiduciary relationship may arise. The first is where the fiduciary duty is innate to a particular relationship that has at its core "discretion, influence over interests, and an inherent vulnerability."[1] The second lies outside established categories of relationship where "given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue." His Lordship went on to find that "discretion, influence, vulnerability and trust" are "non-exhaustive examples of evidential factors to be considered in making this determination," and that a party wishing to assert such reasonable expectations must prove there is "a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party."[2] This is an objective test, based upon the subjective

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[1] At para. 31.

[2] At paras. 32-33.

position of both parties in relation to the facts[3]: Leonard I. Rotman, *Fiduciary Law* (Toronto: Thompson Canada Ltd., 2005).

B. Did Danray owe fiduciary obligations to the individual purchasers of the units?

[34] The trial judge found Danray owed a fiduciary duty to the individual purchasers of the condominium units because Danray remained the *de facto* owner of the property after the sale of the condominium development to the numbered company. She relied on the comments of Wilson J.A. (as she then was) in *York Condominium Corp. No. 167 v. Newrey Holdings Ltd.* (1981), 32 O.R. (2d) 458 (Ont. C.A.) to the effect that when an "owner-developer" of a condominium project begins selling units to the public he has "placed himself in a fiduciary relationship to the unit purchasers not only with respect to their units but also with respect to the interests appurtenant thereto."

[35] In our view, she erred in coming to this conclusion. In all essential respects, Danray was neither the owner nor the developer of Whispering Pines at the time the individual units were marketed to the public. As far as ownership is concerned, Danray had already sold Whispering Pines to Newco. While under the sale agreement Danray retained legal title to the property until closing, this was only because Danray agreed to allow Newco to finance the purchase through the sale of the individual units. For this reason, it retained legal title as security until the deal closed. The rights of beneficial ownership, however, including the right to sell the condominium units, and to retain the benefits of the sale, passed to Newco under the sale agreement. Provided Newco complied with the conditions of the sale agreement, Danray's only interest in the property was that of an unpaid vendor. Newco did comply.

[36] In addition, Danray was not the developer. This term is defined for the purposes of Alberta condominium law by section 1(1)(h) of the *Act* and refers to the party offering to sell the condominium units to the public. The section reads:

> (h) "developer" means a person who, alone or in conjunction with other persons, sells or offers for sale to the public
>
> (i) residential units, or
>
> (ii) proposed residential units,
>
> that have not previously been sold to the public;

[3] At pp. 100-01

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[37] Here Newco advertised and marketed the condominiums, set the price, signed the purchase agreements as vendor, agreed to deliver the property on the possession date,[4] prepared the bylaws and budget which were given to purchasers, and in all other essential respects sold the condominiums to the individual unit holders. Danray was not involved – other than to meet its obligations to Newco under the sale agreement. Indeed, one of the two purchasers who testified at the trial, Corinne Kozak, said she did not know that Danray and Taran existed at the time she purchased her condominium unit.

[38] Other evidence indicates that Danray was not involved in the sale of the individual units to the public. Taran testified that Kornell approached him about entering into a joint venture to sell the condominium units to the public and that he rejected this proposal. The trial judge did not reject this evidence. Taran's testimony is supported by article 18.14 of the sale agreement which reads, in part:

> The Vendor and Purchaser acknowledge and agree they are not partners, agents of one another nor are they involved in a joint venture with respect to the purchase and sale of the Lands as provided in this Agreement.

[39] The trial judge seemed to think that the skip transfers supported her view that this was essentially a joint venture. But the direct transfer of the condominium units, from Danray to the individual unit holders, simply avoided double registration costs. Without this, Newco would have had to register the units in its own name and then transfer them immediately to the individual unit holders. Skip transfers were simply a matter of commercial common sense and they do not help to define this relationship as a joint venture to sell the condominium units. Moreover, retaining legal title secured Danray's position in the event the sale to Newco did not close.

[40] We conclude, therefore, that once Danray signed the sale agreement with Newco it was no longer the beneficial owner of the property. It was simply an unpaid vendor under an agreement for sale with no greater rights unless the sale to Newco failed. As well, because it was not involved in selling the individual units to the public it was not a developer with respect to the individual purchasers. It follows that it did not owe a fiduciary obligation to the purchasers of the individual condominium units because it was an owner-developer of the property.

[41] A fiduciary relationship could still have arisen here if, as La Forest J. suggested in *Hodgkinson*, "given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue." In our view, however, that case is simply not made out here. The purchasers of the individual units bought their condominiums from Newco through its agents, Kornell and Wolanski. Any reasonable expectations with respect to the sale of the units, involving the sacrifice of self-interest,

[4] "...in the same state of the Property's repair and condition on the date of the Offer, reasonable wear and tear only accepted."

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would arise from this relationship. Many of the individual purchasers, particularly those like Kozak who were not tenants at Whispering Pines, did not know who Danray and Taran were. There is simply no evidence to indicate a mutual expectation on the part of Danray and the purchasers of the individual condominium units that Danray would act on the latter's behalf with respect to purchase of the units.

[42] In summary, we conclude that a fiduciary relationship did not arise between Danray and the purchasers of the individual condominium units. But even if we are wrong on this point, and Danray was a fiduciary, we do not think that it had the specific duty to establish and maintain an adequate reserve fund. There was nothing in the *Act* requiring that such a fund be established and maintained. Although the default bylaws, found in section 33 of Appendix 1 of the *Act*, provided for the creation of such a fund, the default bylaws could always be replaced, as they were in this case, by bylaws that did not contain this requirement. Furthermore, if an obligation to create a reserve fund existed under the statutory bylaws in force prior to July 5, 1994, Newco negotiated what it considered an appropriate a reserve fund when it assumed the beneficial ownership of the property under the sale agreement. Newco acknowledged this responsibility when it agreed, in article 17 of the sale agreement, to put $300 per unit into the reserve fund.

[43] More importantly, however, the purchasers bought the property "as it stands", after full right of inspection. They knew, or ought to have known, that they were responsible for assessing the adequacy of the reserve fund at the time of purchase, and for taking that factor into account in deciding whether to purchase the property. The purchasers were given accurate information about the size of the existing reserve fund. Each of the individual purchase agreements stated that the purchaser was offering to buy the condominium "as it stands". This reflects the obligation that falls upon any potential home buyer to inspect the property first and assess the state of repair. The trial judge found as a fact at para. 148 of her reasons that "each of these purchasers was aware of the age of the building and of their units and had an opportunity to assess individual states of disrepair and major states of disrepair." Each individual purchase contract stated:

> The purchaser has inspected the property and agrees that neither the vendor nor the agent has made any representation, warranty, collateral agreement or condition regarding the property or any adjacent lands or lands in close proximity to the property or otherwise which may in any way directly or indirectly affect the property or regarding the contract other than what is written in this contract.

[44] In our view, as a general rule, vendors and purchasers of property act in their own best interest, and do not expect other parties to ensure their future well-being with respect to the state of repair of the property. The individual agreements in this case contemplated that the purchasers had inspected and were buying the property "as it stands". Having regard to all of the contracts, the existing legislation and the facts of this case, Danray did not owe a fiduciary duty to purchasers from Newco to establish an adequate reserve fund. Obligations with respect to capital replacement funds

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(both their existence and the means of establishing them) are matters best left to the Legislature or, in the absence of legislation, to the negotiations between the parties.[5]

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C. Did the trial judge err by finding Taran owed a personal fiduciary obligation to the corporation to establish a reserve fund arising from his brief tenure as a director?

[45] The trial judge found that when Taran was appointed to the Board of Whispering Pines on July 5, 1994, he owed a personal fiduciary duty, as a director, to establish and maintain a proper reserve fund. She found:

> It was not until July 5th of 1994 that Taran personally became involved as a director of the Board. On assuming that position he brought with him the particular and unique knowledge of the status of the condominium's state of repair and the absence of a reserve fund. I find that his fiduciary obligation personally arose at that time. It can be said that his fiduciary obligation was for a short period of time. However, as a director he became personally responsible for establishing and maintaining a proper reserve fund.

[46] It may be that directors of condominium corporations, like other corporate directors, owe fiduciary duties to the corporation to act honestly and in good faith, and not to put their interests in conflict with those of the corporation. But even if such a relationship existed in this case, this did not mean Taran owed a duty to establish and maintain an adequate reserve fund. There was nothing in the statute, or the bylaws in force on July 5, 1994, when Taran became a director, that required the creation of such a fund. In addition, if any obligation existed prior to Taran's appointment as a director it had been assumed by Newco under article 17 of the sale agreement.

[47] Furthermore, Taran's obligation as a director, if it existed, was to act honestly and in good faith, and to avoid conflict of interest. There is no evidence to indicate Taran misled anyone about the state of the reserve fund. The estoppel certificates, which he authorized, stated at para. 5:

> The amount of the Capital Reserve Replacement Fund is NIL. The solicitor for the Purchaser, however, has undertaken to hold in trust and pay to the Condominium Corporation upon demand the sum of $300.00 from the sale

[5] We want to make clear, however, that we are not commenting here on the duties a condominium corporation owes to existing owners of individual units in a condominium project. We are simply saying that on the facts and legislation here, there was no fiduciary duty owed by Danray to purchasers from Newco to establish and maintain an adequate reserve fund.

> proceeds of this and every other unit sold as an initial contribution towards a Capital Reserve Replacement Fund.

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[48] The trial judge found Taran had a conflict of interest, for the 26 days he was a director, because it was in his interest, as well as Danray's, to keep the budget low. She held, at para. 142 of her reasons:

> [W]hile the best interests of the condominium corporation would have been served by an adequate budget, Taran and Danray's interests lay in keeping the budget low. Similarly, while acting as a *de facto* director, Taran was able to maximize his profit from renting the properties, by avoiding any major repairs and at the expense of the condominium corporation...

[49] This logic ignores the fact that under article 16 the sale agreement Danray had given Newco the right, as the beneficial owner of the condominium corporation, to inspect the property and to insist that Danray make any necessary repairs. If Danray failed to make the necessary improvements, Newco was entitled to make them and deduct the cost from the selling price. Thus, Taran was not in a conflict of interest because at the time Taran was appointed as a director Danray was already committed to making any necessary repairs and improvements, and there was nothing Taran could do as a director to assist Danray in avoiding this obligation. It was simply up to Newco to insist that the repairs be made.[6]

[50] Furthermore, the trial judge concluded that Taran deliberately avoided recommending an adjustment in the reserve fund because it was in his interest, as Danray's principal, to keep the reserve fund low so the property could be sold. Yet she also accepted Taran's evidence that if an increase in the reserve fund was necessary he would have insisted that the cost be borne by the realtors through an adjustment in the sale price. She stated: "I note that this realistically reflects Taran's view of the transaction." She seemed to think that sales would have been jeopardized if Taran had recommended an increase in the reserve fund, but this overlooks the fact that the profit made by Newco on at least one of the units (approximately $13,000) indicates the sales were not really in jeopardy.

[51] In summary, there was no fiduciary obligation on Taran to establish a greater reserve fund arising from his 26 days as director. During the time he was a director a reserve fund was not even required by either the *Act* or the bylaws. Similarly, Taran did not misrepresent the facts about the state of the reserve fund in the estoppel certificates, and there is no reason to find that, as a director, Taran put his own interests ahead of the interests of the condominium corporation.

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[6] In fact, this is precisely what happened. Newco identified needed repairs to the roof, decks and furnace rooms and asked Danray to make the repairs. In the end, the parties negotiated a reduction in the sale price.

D. Did Danray and/or Taran have a fiduciary duty to disclose capital deficiencies?

[52] The respondents submit that because: (a) financial disclosure took the form of a budget, (b) the amount budgeted for future repairs was inadequate, and (c) the need for repairs was known to the appellants but was not immediately obvious to a lay person inspecting the building, both Danray and Taran breached a duty arising under the circumstances to inform the purchasers about the physical state of the units and common property.

[53] In our view, there is no substance to this argument. If such a duty arose on these facts, out of a mutual understanding, it could not have fallen on the appellants. It was Newco, as the beneficial owner of the property, and the party actually selling the condominiums to the public, that had the duty to disclose the condition of the property, if such a duty existed. That is why it was Newco that prepared the budget, with the assistance of its own property management company, and presented it to potential buyers. Neither Danray nor Taran was involved. Nor was it unreasonable to expect Newco to fulfill this responsibility. It had the right under the sale agreement to inspect the property and insist that any deficiencies be corrected. If Danray failed to make the requested repairs, Newco could make them and deduct the cost from the sale price.

E. The Cases

[54] We wish to comment briefly on two of the authorities relied on by the trial judge: the decision of the Ontario Court of Appeal in *York Condominium Corp. No. 167 v. Newrey Holdings Ltd.* (1981), 32 O.R. (2d) 458 (O.C.A.), and the decision of this court in *Condominium Plan Number 752-1207 v. Terrace Corp. (Construction)* (1983), 43 A.R. 386, [1983] A.J. No. 773 (Alta.C.A.).

[55] In *York*, the respondent developer constructed a 90-unit condominium complex and sold the individual units to purchasers before it registered the declaration and description creating the condominium corporation. At the same time as it was marketing the units, it sold a number of extra parking stalls that formed part of the common property. The condominium corporation, once formed, sued to recover the proceeds from the sale of the extra parking spaces. The owner- developer argued that prior to registration it was the owner of the property and was entitled to deal with it as it wished. The Court of Appeal held that once the owner started selling units on the basis of a condominium corporation, it became a fiduciary to the unit purchasers with respect to both the individual units being sold and the common property. Thus, it held the common property in trust and could not sell it for personal profit.

[56] A similar situation arose in the *Terrace* case. Terrace built a condominium development containing a parking facility. The roof of the parking structure formed a part of the common property. Terrace appointed its principals, the Zeiters, to the board of the condominium corporation, and the Zeiters leased the roof to Terrace for 99 years. The parking stalls were then sold for a considerable profit. When control of the condominium corporation was finally turned over to a board

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composed of the unit holders, the corporation sued to set aside the lease. The trial judge complied, finding the Zeiters and Terrace had a conflict of interest in making this transaction and were, therefore, in breach of trust. Terrace appealed. This court dismissed the appeal, finding the Zeiters, and by implication, Terrace, had breached a fiduciary duty. Stevenson J.A. (as he then was) relying, in part on *York*, stated: "The lease transaction violated the director's fiduciary duty and was voidable at the instance of the owners of the common property."

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[57] In our view, both these cases are distinguishable from the facts here. They both deal with the situation where an owner-developer of a condominium development disposes of common property, for personal profit, at a time when it holds that common property in trust for the purchasers of the individual units. That is not the situation here. In this case, neither Danray nor Taran was an owner-developer. Even if either of them occupied that position, however, they were not selling property, held in trust, for personal gain. Although the trial judge found that they owed a fiduciary duty to establish a reserve fund, no such duty was imposed by statute. In the absence of a statutory requirement an owner-developer does not owe a fiduciary obligation to have a reserve fund sufficient to pay future capital replacements.

VIII. Conclusion

[58] In our view, the trial judge erred by finding that Danray and Taran each owed a fiduciary duty to the purchasers of the individual condominium units to establish and maintain an adequate reserve fund. The individual purchasers acknowledged they were purchasing on an "as it stands" basis. They were advised of the exact amount in the reserve fund. There were no misrepresentations made by Danray or Taran. Moreover, the sale to the individual unit holders was a sale by Newco and not Danray. The trial judge misunderstood the effect of the sale agreement on the legal obligations of Danray, Taran and Newco to the purchasers of the individual condominium units.

[59] The appeal is allowed, and the judgment set aside.

Appeal heard on October 3, 2006

Memorandum filed at Edmonton, Alberta
this 22nd day of January, 2007

Côté J.A.

Conrad J.A.

Paperny J.A.

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Appearances:

L.M.H. Belzil and F.N. Moore
for the appellants

G.J. Thorlakson
for the respondents

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