Case Name:

Condominium Plan No. 8222909 v. Francis

Between
The Owners: Condominium Plan No. 8222909,
appellant (defendant), and
Brent Francis, Stan George Wong and Cynthia Ewanus
and Regal Pacific Mortgage Corporation, respondents
(plaintiffs)
And Between
The Owners: Condominium Plan No. 8222909, appellant
(plaintiff by counterclaim/defendant), and
Stan George Wong and Cynthia Ewanus, respondents
(defendants by counterclaim/plaintiffs)

[2003] A.J. No. 976
2003 ABCA 234
Docket No.: 0203-0018-AC

Alberta Court of Appeal
Edmonton, Alberta
McFadyen, Picard and Ritter JJ.A.

Heard: May 6, 2003.
Judgment: filed July 28, 2003.
(47 paras.)

Real property — Condominiums — Liability of unit holders — For common areas or expenses — Corporation — Powers.

Appeal by the Condominium Corporation from a judgment in favour of the respondents regarding the calculation of condominium fees. The condominium included residential high-rise units and 10 townhouse units. The respondents were owners of the units. They were entitled to a 65 per cent rebate on the fees that they paid pursuant to the rebate bylaw. The rebate did not apply to occupants of the high-rise units. A new board was elected for the corporation. It set aside the rebate and increased the fees for the units on the basis of their unit factors. The trial judge found that the purchasers of the units were aware of the rebates before they bought them, and that it would be unfair to permit the owners of the high-rise units to receive a benefit at the expense of the respondents. The judge further held that the scheme complied with the Condominium Property Act, that the Corporation was entitled to rebate fees by virtue of its general powers to manage the business and that it was not ultra vires for it to deviate from the collection of fees based on unit factors.

HELD: Appeal allowed. A condominium corporation did not enjoy the powers of a natural person. Since the rebate scheme was not provided for under the Act, it was ultra vires for the Corporation to invoke a scheme that resulted in fees being collected on a basis other than unit factors. The court could not enlarge the powers granted by the legislature. Laches or estoppel could not legitimize ultra vires acts. The indoor management rule could not be applied to correct the irregularity in the rebate scheme. It applied to persons who dealt with a corporation in good faith. It did not apply to bodies formed by statute.

Statutes, Regulations and Rules Cited:

Business Corporations Act, R.S.A. 2000, c. B-9, s. 19.
Companies Act, R.S.A. 1980, c. C-20.
Condominium Property Act, R.S.A. 1980, c. C-22, ss. 20(4), 23, 26, 30(1), 31, 31(1), 39.
Condominium Property Amendment Act, 1996, S.A. 1996, c. 12, s. 32.
Condominium Property Amendment Act, 2000, S.A. 2000, c. 11, s. 13.

Appeal From:

On appeal from the whole of the judgment of Moore J., dated November 1, 2001.

Counsel:

L.M.H. Belzil, for the appellant.
C.L. Plante, for the respondents.

REASONS FOR JUDGMENT

Reasons for judgment were delivered by Ritter J.A. Concurred in by McFadyen J.A. and Picard J.A.

¶ 1 **RITTER J.A.**:— This appeal involves an issue of statutory interpretation, specifically, whether s. 31 of the Condominium Property Act, R.S.A 1980, c. C-22 (the "Act") prevents the appellant condominium corporation from collecting condominium fees for ten townhouse units on a basis other than the unit factors attached to each unit. It is my conclusion that the scheme of collection based on unit factors, with an automatic rebate, breaches this provision and is therefore ultra vires the appellant. I also conclude that damages awarded to the respondents must be set aside, as a basis for them does not exist. Finally, the award of solicitor-client costs to the respondents is set aside.

Background

¶ 2 The appellant was incorporated in 1982. It is a mixed use condominium with 209 residential high-rise units, two ground floor commercial units, and ten townhouse units. Until 1994, the complex operated as a rental apartment building with all units being owned by Waters Edge Ltd. In 1994, all units were sold by Waters Edge Ltd. to an intervening purchaser, 496454 Alberta Ltd. (the "Developer"), who sold them to the public. All of the public sales closed simultaneously on September 27, 1994.

¶ 3 Part of the sale documentation provided to each purchaser was a proposed amendment to the condominium by-laws which contemplated a 65% rebate of condominium fees to the townhouse unit purchasers, payable on the basis of unit factors. On September 1, 1994, an agent for the Developer, Darren Latoski ("Latoski"), was appointed to form the board of the appellant. At this time, there was a blanket mortgage registered against the title of all the units of the appellant. Latoski was never registered as a board member at the Land Titles office.

¶ 4 On September 28, 1994, Latoski signed ten rebate agreements with the purchasers of the ten townhouse units, entitling them to a 65% rebate of condominium fees for each of the units. The by-law amendment which provided for the rebate agreements was dated September 1, 1994 and was signed by an unknown person believed to be from Waters Edge Ltd. The by-law amendment had already been filed at the Land Titles Office.

¶ 5 The first meeting of the new owners took place in February 1995 and a board of directors was elected and registered at the Land Titles office. The board did not receive a minute book or other corporate documents from the Developer until just before the trial of this matter. This board considered the fee rebates granted to the townhouse owners and found them to be fair. While the townhouse units had a greater unit factor allotted to them, they were metered and charged separately for utilities, which were common expenses for the high-rise units. Also, the

townhouse units had separate garages which were not common property, while the parkade that provided parking to the high-rise unit owners was common property, the upkeep and repair of which was to be paid from money collected as condominium fees. It was due to these factors that the Developer entered into the rebate agreements with the townhouse owners.

¶ 6 At the second general meeting of the appellant, held in February 1996, a new board was elected. In October 1996, a new property manager was retained who shortly thereafter advised the board that the rebate question should be considered. The board considered the rebate by-law in December 1996 and determined it to be invalid, as it was executed other than in the prescribed manner, and it was contrary to the spirit of fee collection by unit factor.

¶ 7 The board then notified the townhouse owners of an increase in their fees reflecting the amount payable on the basis of their unit factors. A series of meetings among the board, its legal counsel, the townhouse owners and their legal counsel followed. Options were explored including the board offering to assume the payment of utilities owing by the townhouse owners. But all of these failed and the matter ultimately came to trial in the Court of Queen's Bench commencing December 11, 2000.

¶ 8 Eight of the townhouse units were purchased by the respondent Brent Francis ("Francis") in September 1994. On April 20, 2000, he assigned himself into bankruptcy. His trustee declined to assume conduct of these proceedings, but the respondent Regal Pacific Mortgage Corporation ("Regal Pacific") ultimately took conduct of his part in the litigation on the basis that it held a general security agreement over Francis' assets, and his interest in the litigation comprised a chose in action which was caught by the agreement.

¶ 9 Just before trial, Regal Pacific purported to assign its interest in this chose in action to a numbered British Columbia corporation but then "changed its mind" and by letter from its counsel informed the appellant that it was retaining control of Francis' interest. While this series of dealings is referenced in the trial decision, it is not resolved. However, it is implicit in the result that the trial judge accepted that the transfer to the British Columbia corporation was never concluded.

The Trial Decision

¶ 10 The trial decision is reported at (2001), 304 A.R. 294, 49 R.P.R. (3d) 123, [2001] A.J. No. 1567, 2001 ABQB 921. In that decision, the trial judge concluded that all purchasers of the condominiums were aware of the rebate agreements when they purchased their respective units. Therefore, it would be unfair to permit the owners of the high-rise apartment units to receive a benefit at the expense of the townhouse unit owners. Further, the scheme complied with the Act, as full fees based on unit factors were initially assessed and then 65% of those fees were rebated back to the townhouse owners. The appellant enjoyed the ability to rebate fees by virtue of its general powers to manage its business. In addition, it was not ultra vires of the appellant to deviate from collection of fees based on unit factors, as the appellant was entitled to do what was necessary to ensure that equity was achieved and that each owner was only responsible for his or her fair share of common expenses.

¶ 11 Finally, by way of remedy, the trial judge declared that the appellant had to continue to rebate 65% of the fees in accordance with the rebate agreements. He added Regal Pacific as a plaintiff in the action, awarding damages for the difference between the value of the eight units based on an entitlement to a 65% fee rebate and their value based on no such entitlement. This respondent was singled out, as the units originally owned by Francis had been sold, allegedly at the loss for which they were compensated. The units belonging to the other respondents, Stan George Wong ("Wong") and Cynthia Ewanus ("Ewanus"), had not been sold so that the declaration that the by-law and agreements were valid restored their value. The appellant's counterclaim for condominium fee arrears from September 1994 to the date of judgment was dismissed. The respondents were awarded costs on a solicitor and client basis.

Legislation

¶ 12 This appeal engages a number of provisions of the Condominium Property Act, supra. In particular, it is the position of the appellant that a condominium corporation does not enjoy natural person powers, as does a business corporation under the Business Corporations Act, R.S.A. 2000, c. B-9, and that it must therefore look to the Act to see if it has the requisite authority to make certain decisions or take particular actions.

¶ 13 Section 23 of the Act concerns the establishment of a board of management. It provides:

> 23(1) A corporation shall have a board of managers that shall be constituted as provided by the by-laws of the corporation.
>
> (2) A corporation shall, within 15 days of a person becoming or ceasing to be a member of the board, file at the land titles office a notice in the prescribed form stating the name and address of that person and the day that the person became or ceased to be, as the case may be, a member of the board.
>
> (3) The powers and duties of the corporation shall, subject to any restriction imposed or direction given at a general meeting, be exercised and performed by the board of the corporation.
>
> (4) All acts done in good faith by a board are, notwithstanding that it is afterwards discovered that there was some defect in the election or appointment or continuance in office of any member of the board, as valid as if the member had been properly elected or appointed or had properly continued in office.

¶ 14 Section 26 of the Act deals with the by-laws of the corporation. It provides:

> 26(1) The by-laws shall regulate the corporation and provide for the control, management and administration of the units, the real and personal property of the corporation and the common property.
>
> (2) Any by-law may be amended, repealed or replaced by a special resolution.
>
> (3) An amendment, repeal or replacement of a by-law does not take effect until
>
> (a) the corporation files a copy of it with the Registrar, and
>
> (b) the Registrar has made a memorandum of the filing on the condominium plan.
>
> (4) No by-law operates to prohibit or restrict the devolution of units or any transfer, lease, mortgage of other dealing with them or to destroy or modify any easement implied or created by this Act.
>
> (5) The by-laws bind the corporation and the owners to the same extent as if the by-laws had been signed and sealed by the corporation and by each owner and contained covenants on

the part of each owner with every other owner and with the corporation to observe and perform all the provisions of the by-laws.

¶ 15 Section 30(1) of the Act deals with the corporation's management power. It provides:

30(1) A corporation is responsible for the enforcement of its by-laws and the control, management and administration of its real and personal property and the common property.

¶ 16 Section 31(1) of the Act deals with raising funds for the purposes of the corporation. It provides:

31(1) In addition to its other powers under this Act, the powers of a corporation include the following:

(a) to establish a fund for administrative expenses sufficient, in the opinion of the corporation, for the control, management and administration of the common property, for the payment of any premiums of insurance and for the discharge of any other obligation of the corporation;

(b) to determine from time to time the amounts to be raised for the purposes mentioned in clause (a);

(c) to raise amounts so determined by levying contributions on the owners in proportion to the unit factors of their respective units;

(d) to recover from an owner by an action in debt any sum of money spent by the corporation

(i) pursuant to a by-law, or

(ii) as required by a local authority or other public authority,

in respect of the unit or common property that is leased to that owner under section 41.

¶ 17 In 1996, the Legislature of the Province of Alberta passed legislation amending s. 31(1) of the Act so as to permit the assessment of fees on a basis other than unit factors: Condominium Property Amendment Act, 1996, S.A. 1996, c. 12, s. 32. The provision is now s. 39 of the Condominium Property Act, R.S.A. 2000, c. C-22. However, this provision was not proclaimed until September 1, 2000: Condominium Property Amendment Act, 2000, S.A. 2000, c. 11, s. 13. After it came into effect, the board met and proposed that the townhouse owners receive a rebate of 40% of their fees. This proposal was rejected by the respondents Wong and Ewanus but was accepted by HSBC, the first mortgagee of the Francis units, which by then were subject to foreclosure proceedings such that HSBC became the owner of the Francis units on December 21, 2000.

¶ 18 The resolutions which were passed by the corporation to give effect to the 40% rebate arrangement with HSBC also extend to the respondents Wong and Ewanus so that in future they will receive a rebate of 40% of their fees. Further, the appellant is not pursuing an appeal respecting its counterclaim for condominium fee arrears.

Therefore, none of the respondents will have to repay any part of the 65% rebated to them between the time of their purchases and the trial judgment.

Standard of Review

¶ 19 The question of whether the by-law and rebate agreements are ultra vires is a question of law and the correctness standard applies. Likewise, the question of whether delay may be considered when dealing with otherwise ultra vires acts and the issue of whether the "indoor management rule" applies to condominium corporations are matters of law for which the correctness standard applies.

¶ 20 The issue of whether the trial judge should have added Regal Pacific as a party during the trial deals with a procedural question to which the reasonableness standard applies. All issues relating to fact findings call for a standard based on palpable or overriding error. Finally, the question relating to the award of damages on a basis unknown in law is one of law and the correctness standard applies to it.

Analysis

1. Validity of the By-law and Rebate Agreements

¶ 21 The main issue in this appeal is whether it was ultra vires of the condominium corporation to invoke a scheme which resulted in condominium fees being collected on a basis other than unit factors. Part of the analysis of this question involves a determination of whether the rebate scheme, by which fees are purported to be collected and rebated back, complies with s. 31 or is otherwise authorized by the Act. This issue will be dealt with first because if the scheme does not breach s. 31, or is otherwise valid, that conclusion will dispose of the appeal.

¶ 22 The scheme of rebates relating to the townhouse units consists of two elements. First, the Developer purported to pass the rebate by-law, and second, when the Developer sold the townhouse units, it entered into rebate agreements with each purchaser. Both the by-law and the rebate agreements provide for a rebate of 65% of fees collected on the basis of unit factors to the townhouse owners. Both state that the rebate lasts for 50 years, renewable for subsequent periods of 50 years. The rebate agreement provides that the entitlement to the rebate runs with the title to each townhouse unit. The rebate agreement also provides that if the condominium corporation fails to comply with the agreement, the townhouse owner holding the interest in the agreement at the relevant time will receive damages in a sum equivalent to the 65% rebate.

¶ 23 In practice, the townhouse owners did not make full payment of the fees based on their unit factors and then receive back a rebate of 65%. They simply paid 35% of the fees otherwise payable.

¶ 24 This scheme can only be perceived as a thinly-veiled attempt to have the townhouse unit owners pay fees on a basis other than unit holdings. The by-law makes it clear that the whole purpose was to address the perceived inequality created by unit factor assessment of fees relating to the utility and garage issues. The duration of the rebate agreement is, for all practical purposes, for the useful life of the project. The manner of payment reflects payment of fees on a basis other than unit factors. I therefore conclude that the scheme does not comply with s. 31 of the Act.

¶ 25 The second step in the analysis of the ultra vires issue involves an interpretation of s. 31 of the Act read with other provisions of the Act and the Act as a whole. In this respect, the words of the Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act and the intention of the legislature: Re Rizzo & Rizzo Shoes Ltd., [1998] 1 S.C.R. 27, 36 O.R. (3d) 418; Bell ExpressVu Limited Partnership v. Rex (2002), 212 D.L.R. (4th) 1, [2002] S.C.J. No. 43, 2002 SCC 42; Love v. Flagstaff (County of) Subdivision and Development Appeal Board, [2002] A.J. No. 1516, 2002 ABCA 292.

¶ 26 A contextual analysis of the Act reveals that a condominium corporation does not enjoy the same powers

of a natural person, as do most business corporations. The Act does not provide for such powers; rather s. 20(4) of the Act states that the Business Corporations Act, supra, which attributes natural person powers to corporations created under it, does not apply to a condominium corporation.

¶ 27 Also, as a condominium corporation is created by statute, it owes its existence to the statute and can only undertake actions its creating statute specifically authorizes: Ashbury Railway Carriage & Iron Co. v. Riche, (1875) L.R. 7 H.L. 653; Cowe v. Strata Plan VR1349 (1994), 92 B.C.L.R. (2d) 327 at paras. 10-12; 453048 British Columbia v. Strata Plan KAS 1079 (1994), 43 R.P.R. (2d) 293 at 296-97, at paras. 10-11.

¶ 28 The interpretation of the powers of other statutorily created corporations supports this conclusion. In Guaranty Properties v. Edmonton (City) (1998), 220 A.R. 223, 61 Alta. L.R. (3d) 266, [1998] A.J. No. 198, 1998 ABQB 68 at para. 46, Costigan J. (as he then was), considered the issue of powers granted to a municipal corporation created by the Municipal Government Act, R.S.A. 1980, c. M-26.1 and stated:

> The defendant municipality was created by statute. Its power to contract also arose from and was limited by statute. Therefore, if the defendant purported to enter into an agreement which was beyond its statutory capacity, the doctrine of ultra vires would render the contract void.

¶ 29 Under the Companies Act, R.S.A. 1980, c. C-20, which preceded the Business Corporations Act, supra, and did not attribute natural person powers to companies incorporated under it, the issue of ultra vires was treated in the same way. That is, an activity that was contrary to either the articles of association of the corporation or the Companies Act was ultra vires of the corporation. Thus, contracts entered into by a company which were not authorized by the articles or were in contravention of the Companies Act were ultra vires of the company. In Angus v. R Angus Alberta Ltd. (1988), 85 A.R. 266 at para. 42, 58 Alta. L.R. (2d) 76 at 87, 50 D.L.R. (4th) 439 at 449 (C.A.), this Court stated:

> Acts of a company carried out in contravention of the Companies Act are illegal and ipso facto ultra vires because they are incapable of being ratified by the shareholders. The shareholders cannot approve a breach of statute.

¶ 30 The respondents also argue that the provisions of the Act are to be given a liberal and remedial interpretation. However, broad, liberal and remedial interpretations do not permit courts to ignore words that are part of an enactment. The only provision in the Act dealing with the issue of how fees are to be collected is s. 31. That provision enables a condominium corporation to collect fees on a unit factor basis. It does not empower condominium corporations to collect fees based on other considerations. It is not the role of the courts to enlarge what the legislature has chosen to provide for whenever a possible inequity may occur as a result of the enforcement of the plain meaning of the legislative provision. The appropriate remedy is either to avoid the problem by correctly allocating unit factors in the first place, or by an amendment to the legislation. With respect to s. 31 the legislature has chosen to do exactly that. I conclude it did so because it perceived situations, perhaps such as the one presented here, where other considerations aside from unit factors formed the appropriate basis for the attribution of a condominium fees.

¶ 31 The respondents argue that resort may be had to s. 30 relating to the management powers of the corporation. However, this section does not support the respondents' position. The responsibility for enforcement of by-laws does not provide a corporation with natural person powers. It only enables it to enforce otherwise valid by-laws. Further, the control, management, and administration of the corporation's property says nothing about how money is to be raised for the care of the common property and the payment of utilities.

¶ 32 The scheme of the Act does not permit a court to impose what it considers to be fair on a case-by-case basis. Rather, the scheme is designed to provide certainty to owners and corporations alike. It thereby achieves

fairness, as a reading of relevant provisions reveals that the legislature has chosen to limit the power of condominium corporation to impose fees. The extent of that limitation is apparent on any reading of s. 31 of the Act. All owners should be able to rely on the knowledge that fees will always be collected as a readily calculable amount based on unit factors. This form of assessment provides owners with certainty that their portion of fees will never exceed the proportion of unit factors they hold in relation to the entire number of unit factors issued. This certainty remains regardless of the whims of a board or its views regarding other aspects of fairness. It must be remembered that every departure from collection of fees on a basis other than unit holdings will result in someone paying proportionately more. Here, it is the owners of the high-rise units who are asked to do so.

¶ 33 The trial judge relied on several decisions from other jurisdictions in concluding that the scheme was not ultra vires: Carleton Condominium Corp. No. 441 v. Carleton Condominium Corp. No. 441 (1998), 42 O.R. (3d) 62, 114 O.A.C. 370; Winnipeg Condominium Corp. No. 12 v. Edwardian Estates (1995), 100 Man. R. (2d) 234, 123 D.L.R. (4th) 16 (C.A.); York Region Condominium Corp. No. 771 v. Year Full Investment (Canada) (1992), 10 O.R. (3d) 670, 95 D.L.R. (4th) 327 (Gen. Div.), aff'd (1993), 12 O.R. (3d) 641, 100 D.L.R. (4th) 449 (C.A.). However, a review of each of these decisions reveals that they either did not go as far as the trial judge determined, or were based on legislation which authorized the court to achieve "equitable" results. Similar provisions are not found in the Act.

¶ 34 I conclude that the rebate by-law and agreements are contrary to the Act and are therefore ultra vires and unenforceable.

2. Delay and Estoppel

¶ 35 The short answer to the question of whether laches or estoppel can legitimize an otherwise ultra vires act is that they cannot. An ultra vires act is an illegal act and it remains such even if it is acted on over the course of time or on separate consecutive occasions: Halsbury's Laws of England, 4th ed., vol. 16 (London: Butterworths, 1992) at 907; Maritime Electric Co. v. General Dairies, [1937] 1 All E.R. 748, [1937] 1 D.L.R. 609 (P.C.) ("Maritime Electric"); York Condominium Corporation No. 288 v. Harbour Square Commercial (1988), 49 R.P.R. 264 at 271-72, at paras. 43-47 (D.C.) ("York Condominium v. Harbour Square"); Northern Alberta Agribusiness v. Falher (Town) (1980), 14 Alta. L.R. (2d) 97 at 102, at para. 11 (Q.B.); United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City) (2002), 303 A.R. 249 at 289, 3 Alta. L.R. (4th) 211 at 259, [2002] A.J. No. 694, 2002 ABCA 131 at para. 163, leave to appeal to the S.C.C. requested [2002] S.C.C.A. No. 318 (QL).

¶ 36 In Maritime Electric, supra, an electrical utility company erroneously undercharged a customer when it was, by statute, required to charge all customers equally. Although the customer relied to his detriment on the low bills and therefore had grounds for an argument of estoppel, this defense was denied by the Judicial Committee of the Privy Council which noted "the duty of each party is to obey the law" (at All E.R. 753, D.L.R. 613).

¶ 37 This same principle applies to condominium corporations. In York Corporation v. Harbour Square, supra, a condominium corporation wrongly permitted the unauthorized use of common property over four years, and then retracted its authorization. The court rejected the estoppel defense on the grounds that it is not effective against a statutory duty or obligation. Similarly, in Strata Plan 1261 v. 360204 B.C. Ltd. (1995), 50 R.P.R. (2d) 62, an agreement between a condominium corporation and a company allowing the company to rent out spaces in a parking garage was declared invalid because there had been no resolution of the owners in relation to this common property, notwithstanding that the agreement had been in place without complaint for four years.

3. The Indoor Management Rule

¶ 38 The trial judge applied the indoor management rule to correct an irregularity in the passage of the rebate by-law. The problem arose because when the rebate by-law was passed, the board had only one member and the general by-laws of the corporation state that when there is a mortgage on title, the board is to consist of at least three

people. At the time of the passage of the rebate by-law, a mortgage was in place.

¶ 39 The indoor management rule states that persons dealing in good faith with a corporation are entitled to assume that prescribed formalities have been met. However, this rule does not apply to bodies formed by statute: Hollenberg v. British Columbia Optometric Association (1967), 61 D.L.R. (2d) 295 at 307, at para. 3 (S.C.). Further, the Act does not contain any saving provision such as that found in s. 19 of the Business Corporations Act, supra. Finally, if the decision in York Condominium Corporation No. 162 v. Noldon Investments Ltd. (1977), 1 R.P.R. 236, (Ont. H.C.J.) applies to irregularities respecting condominium corporation contracts, I decline to follow it. However, that decision nonetheless emphasizes the importance of formalities when the developer is in control, as was the case when the rebate by-law was passed.

¶ 40 I agree that there is an added importance to ensuring that formalities are met while the developer is in control. Compliance with formalities serves as an additional protection to purchasers of units in the development, as it serves to avoid secret by-laws and agreements that may only surface when the corporation is turned over to the purchaser board, or some time later when the developer turns over the corporate documents to the owner board.

¶ 41 I conclude that the indoor management rule has no role to play in the analysis of the enforceability of contracts entered into by condominium corporations.

4. The Addition of Regal Pacific as a Party and Findings of Fact

¶ 42 A decision to add a plaintiff to the action is entitled to deference from an appellate court: Alberta Treasury Branches v. Ghermezian (2000), 266 A.R. 170 at 173, 84 Alta. L.R. (3d) 229 at 232, [2000] A.J. No. 963, 2000 ABCA 228 at para. 12. I do not propose to interfere with the trial judge's exercise of that discretion in adding Regal Pacific as a party.

¶ 43 Issues relating to findings of fact engage a standard of review where such findings are not to be reversed unless it can be established that the trial judge made a palpable and overriding error: Housen v. Nikolaisen (2002), 286 N.R. 1 at 12, 211 D.L.R. (4th) 577 at 584-85, [2003] S.C.J. No. 31, 2002 SCC 33 at para. 10. The appellant is unable to demonstrate such error. With respect to the one issue which was argued at the appeal, being whether or not there was a "standstill agreement", there was support for the finding of the trial judge. In any event, that finding must be considered in context. If, contrary to what the trial judge found, there was a standstill agreement, that agreement only covered a short period of time between the passage of the rebate by-law and the litigation. Regardless, I have determined that delay cannot make an illegal act legal.

5. The Basis for the Damages Awarded

¶ 44 The appellant argues that the trial judge awarded damages for a cause of action unknown to law. This issue does not need to be addressed, as damages cannot have been awarded given the conclusion that the by-law and contracts were ultra vires of the appellant.

6. Costs at Trial

¶ 45 The trial judge awarded solicitor-client costs to the respondents. In view of the decision I have reached, those costs are set aside. I do not propose to deal with whether that award would have been an unreasonable exercise of discretion had the trial judge correctly found in favour of the respondents.

¶ 46 However, the respondents retain a degree of the success they achieved at the trial as the appellants abandoned its appeal with respect to fees rebated to the date of the trial decision. The appellants are therefore entitled to costs based on this degree of success.

Conclusion

¶ 47 I would allow the appeal and dismiss the respondents' claims.

McFADYEN J.A.: I concur.
PICARD J.A.: I concur.
RITTER J.A.

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Case Name: Condominium Plan No. 8222909 v. Francis

Court: 2003 Alberta Court of Appeal

Reported at:
[2003] A.J. No. 976
2003 ABCA 234

History of Case

Same Case [S]
Alberta Court of Queen's Bench
[2001] A.J. No. 1567
2001 ABQB 921
(2001) 49 R.P.R. (3d) 123
(2001) 304 A.R. 294

Same Case [S]
Alberta Court of Queen's Bench
[2000] A.J. No. 1208
2000 ABQB 700

Same Case [S]
Alberta Court of Queen's Bench
[2000] A.J. No. 772
2000 ABQB 443

Same Case [S]
Alberta Court of Queen's Bench
[1999] A.J. No. 562
1999 ABQB 366

Same Case [S]
Alberta Court of Queen's Bench
[1998] A.J. No. 1761
1998 ABQB 971

Summary of Judicial Consideration

Followed [f st]: 1

Treatment

View references by jurisdiction, court level and treatment

Followed [f st]
(AltaCA)
Condominium Plan No. 9621019 v. 412316 Alberta Ltd.
[2003] A.J. No. 977 Locus Para 1
2003 ABCA 235