CITATION: Essex Condominium Corporation No. 89 v. Glengarda Residences Ltd., 2010 ONCA 167
DATE: 20100308
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COURT OF APPEAL FOR ONTARIO

Doherty, Goudge, LaForme, Rouleau and Watt JJ.A.

BETWEEN

Essex Condominium Corporation No. 89 and
Essex condominium Corporation No. 101

Plaintiffs (Respondents)

and

Glengarda Residences Ltd.

Defendant (Appellant)

Myron W. Shulgan, Q.C. for the appellant

Avril A. Farlam, for the respondents

Heard: December 9, 2009

On appeal from the judgment of Justice Joseph G. Quinn of the Superior Court of Justice dated May 13, 2008.

Roulcau J.A.:

[1] Section 52 of the now repealed *Condominium Act* R.S.O. 1990, c. C26 requires a declarant (a condominium developer) to provide prospective purchasers with a disclosure statement which includes a budget for the condominium's first year of operation. Where

the statement contains false, deceptive or misleading material information or omits material information, s. 52(5) provides both unit owners and the condominium corporation with a remedy for any damages or loss sustained as a result of reliance on the misstatement.

[2] The appellant seeks to set aside the trial judgment wherein the appellant/declarant, Glengarda Residences Ltd., was held liable to the respondent condominium corporations for the failure to disclose sufficient information to condominium buyers regarding a lease of the heating, ventilation and air-conditioning system (HVAC) serving the shared rotunda in which the recreation facilities are located. The trial judge held that "[a] reasonable purchaser who read the disclosure document carefully would not know that the HVAC system in the rotunda was not part of the purchase price and that he was assuming seven years of a lease with a balloon payment in addition to the one-year of the lease referred to in the budget" (para. 15).

FACTS

[3] The appellant Glengarda was the developer of the respondent condominium corporations. The condominiums were developed in two phases: Condominium No. 89 was developed as Phase 1; and Condominium No. 101 was developed at a later date as Phase 2. The condominium buildings are each 12 storeys in height. They are connected by a rotunda that houses facilities the use of which is shared by the unit owners of both condominiums. The shared facilities area is equipped with its own HVAC system.

[4] The trial judge found that the appellant intended from the outset to acquire the HVAC equipment and, prior to turning the buildings over to the condominium corporations, sell it to a financial institution that would lease the equipment back to the respondents.

[5] As required by the *Act*, prior to marketing the condominium units in Phase 1 of the development (Condominium No. 89), the appellant prepared a disclosure statement which was provided to prospective purchasers. This disclosure statement is dated November 18, 1998 and included in a package of documents entitled "The Gates of Glengarda Riverview Phase One Condominium Documents" which also included budgets for Phase 1 of the project and the shared facilities, dated November 1, 1998 and October 1, 1998 respectively. These documents were thus prepared before sales began in 1999. I note that most of the units were marketed and sold prior to the actual construction of the building.

[6] In May 2001, approximately three months after the declaration creating Condominium Corporation No. 89 was registered and the first condominium building turned over to it, the appellant sold the HVAC equipment to the Royal Bank for the sum of $151,529. The Royal Bank then leased the equipment back to the condominium corporation on an 8-year lease at a rate of approximately $2,600 per month with a purchase option price of $32,400 at the end of the lease.[1]

[1] Although the trial judge found and the parties seem to agree that the term of the lease was 8 years, I note that the lease document contained in the exhibit books before the Court lists a term of 84 months. However, in my view, nothing turns on this discrepancy and I will therefore rely on the trial judge's finding.

[7] The disclosure statement identified the fact that the cost of operating the shared facilities was to be divided between the two condominiums and was part of the condominiums' common expenses charged to individual unit owners. The projected first year's budget for the shared facilities prepared by the appellant and contained in the disclosure statement included the following entry: "HVAC lease $34,900". This entry was under the heading "Repairs and Maintenance". A note to the budget explained that the HVAC lease was for "cost of the lease for air make-up and other air handling equipment in this area."

[8] When the disclosure statement was prepared in 1998, the HVAC equipment had not yet been acquired as construction of the building had not yet commenced. The lease could not be negotiated until the equipment was acquired, sold to the bank and leased back to the condominium. As noted, this did not occur until May 2001. As a result, none of the terms of the proposed lease were known when the disclosure documents were drafted and the first units sold. The appellant did, however, include an estimate of the projected annual cost of the lease in the projected first year budget.

[9] The respondents only learned of the sale and lease back transaction approximately six years later as a result of a building audit. Only then did the respondents discover that they were bound by an 8-year lease of the HVAC equipment and that, at the end of the lease, they would have to make what the trial judge referred to as a $32,400 "balloon payment".

[10] The respondents therefore brought a lawsuit claiming that the disclosure statement provided by the appellant lacked necessary information.

[11] The trial judge found that the appellant's failure to include any narrative in the disclosure statement about the lease of the shared facilities' HVAC equipment was misleading and therefore violated s. 52(5) of the *Act*. As a result, he awarded damages equal to the full amount of the HVAC lease, less the costs for the first year of the lease which he found had been "clearly set out in the shared facilities budget and were partially paid by the [appellant]".

ISSUES

[12] When the appeal first came before the court for hearing, the appellant advised that it was taking the position that this court's earlier decision in *Wellington Corp. No. 61 v. Marilyn Drive Holdings Ltd.*, [1998] 37 O.R. (3rd) 1 (*Wellington*) had been wrongly decided by this court and should be overruled. As a result, the appeal was adjourned and made returnable before a five-judge panel. If the appellant is successful on this ground, it submits that it is clear that the appeal must be allowed.

[13] In the alternative, if it is unsuccessful in seeking to overrule *Wellington*, the appellant raises the following three grounds of appeal:

1) that the trial judge erred in finding that the appellant's failure to provide the HVAC lease information was a breach of its disclosure obligation;

2) that the trial judge erred by failing to recognize that the appellant had different disclosure obligations to each of the two condominium corporations; and

3) that the trial judge erred in not requiring the condominium corporations to prove that their losses were incurred in reliance on the omitted information.

[14] For the reasons that follow, I would reject the appellant's submission with respect to the correctness of the *Wellington* decision but would allow the appeal on the basis of the appellant's alternate submissions.

ANALYSIS

Was Wellington correctly decided?

[15] The appellant argued that this court's decision in *Wellington* was wrongly decided and should be overruled. It submits that *Wellington* is incorrect because it provides that a condominium corporation can recover damages for breach of s. 52(5) of the *Act* without complying with the requirement in s. 52(5) of showing that the unit purchasers suffered losses *in reliance* on a material misstatement or omission of information in a disclosure statement required to be delivered by a declarant to unit owners.

[16] I would reject this submission.

[17] The need to address the reliance requirement in s. 52(5) differently in an action by a condominium corporation as compared to an action by a unit owner was fully explored in *Wellington*. At pp. 19 and 20 of that decision, Rosenberg J.A. explained that s. 14(2) of the *Act* created a cause of action for the condominium corporation "even if the

corporation was not a party to the contract in respect of which the action is brought." As he explained, read in the context of the legislation, it was manifest that the legislator intended "that the corporation be entitled to recover damages where the real injury is to the owners as a group rather than to any individual." He went on to explain that "in s. 52(5), the legislature has given the corporation the power to recover damages for false statements that were not made to it and upon which it therefore could not have relied." He then concluded that he could not "accept that the legislature nevertheless intended that the corporation prove it actually relied upon those statements." As a result, he concluded that "actual reliance need only be proved where the unit owner brings an action for damages."

[18] I see no basis to disagree with these observations. They reflect a reasoned and contextual interpretation of the relevant sections of the *Act*.

[19] Further, I do not, as the appellant suggests, view the test established in *Wellington* as ignoring the legislature's intention to restrict damages awarded for breach of s. 52(5) of the *Act* to losses suffered *in reliance* on a material misstatement or omission of information from the disclosure statement. *Wellington* simply struck a different approach to the requirement that the condominium corporation establish reliance, an approach that takes into account the fact that the statute creates a right of action even though the condominium corporation was not a party to the contract in respect of which the disclosure statement was made and the action brought.

[20] As set out by Rosenberg J.A., the condominium corporation nonetheless needs to establish reliance. It does so, however, by demonstrating that "it cannot reasonably carry out its duty to control, manage and administer the common elements and the assets of the corporation and to manage the property without incurring the expense occasioned by the false, deceptive or misleading statement or information or the expense that should have been disclosed in the disclosure statement."

[21] In my view, therefore, there is no need to revisit the *Wellington* decision.

Did the trial judge err in finding that the appellant's failure to provide the HVAC lease information was a breach of its disclosure obligation?

[22] Section 52(1) of the *Act* requires that the declarant provide a disclosure statement to each purchaser of condominium units. Section 52(6) sets out a list of what must be contained in the disclosure statement. Included in this list is a budget statement for the condominium's first year of operation immediately following the registration of the declaration (s. 52(6)(e)). The consequences of failing to fully disclose all of the information required by the *Act* are set out in s. 52(5), which provides as follows:

> **Where statement false or misleading**
>
> (5) Where any statement or material required under this Act to be provided by a declarant or proposed declarant to a purchaser of a unit or proposed unit for residential purposes contains any material statement or information that is false, deceptive or misleading or fails to contain any material statement or information, the corporation or any unit owner who relied on such statement or material is entitled, as against the declarant or the proposed declarant to damages for any loss sustained as a result of such reliance.

[23] To succeed in a claim pursuant to s. 52(6) the claimant must demonstrate both that there has been a material misstatement or that a material statement was omitted and that it has relied on this misstatement or omission. I will deal with each of these two elements in turn.

a) Was there material misrepresentation or was a material statement omitted?

[24] The trial judge concluded that there had been material non-disclosure based on his finding that the disclosure statement did not "disclose the term of the lease, the total cost of the leased equipment, the rate of interest, the balloon payment, what equipment is subject to the lease, or *that there was a capital item that was not included in the purchase price*" (para. 13, emphasis added). Later in his reasons, he reiterated that "a reasonable purchaser who read the disclosure document carefully *would not know that the HVAC system in the rotunda was not part of the purchase price* and that he was assuming seven years of a lease with a balloon payment in addition to the one year of the lease referred to in the budget" (para. 15, emphasis added).

[25] Although the trial judge correctly observed that the terms of the lease, other than the first year's payment, had not been disclosed, his finding that a purchaser would not know that the HVAC system was not owned by the condominium corporation cannot, in my view, stand.

[26] The disclosure document clearly stated that the HVAC equipment was leased. *Black's Law Dictionary* defines a lease as, "a contract by which the rightful possessor of

personal property conveys the right to use that property in exchange for consideration" (*Black's Law Dictionary*, 8th ed., *s.v.* "lease"). Having read that the equipment was leased, the only reasonable conclusion a purchaser could reach is that this equipment was not owned.

[27] The question then becomes, having disclosed that the equipment is leased as well as estimating the cost of the lease in the first year, is the disclosure adequate to meet the rigorous disclosure standards intended by the *Act*?

[28] Pursuant to s. 52 of the *Act* the declarant is required to provide current disclosure statements and all material amendments thereto. The specific obligations are broadly worded and mandatory. They are intended to protect the consumer and should be interpreted as such.

[29] When the appellant prepared the disclosure statement, it could not set out the terms of the HVAC lease because, at that time, the equipment had not been acquired, or installed and the lease had not been negotiated or entered into.

[30] However, as noted by the trial judge, the appellant could have estimated the cost of the equipment, the term and rate of interest of the lease, and the amount of the payment required at the end of the lease to purchase the equipment. Although I agree that such estimates may well have been useful information, the issue is not whether the estimate would have been useful. Rather, the issue is whether the information is of sufficient importance that the appellant's failure to disclose it makes the information

contained in the disclosure statement "false, deceptive or misleading" or incomplete in a "material respect." In my view, it does not.

[31] Section 52(6)(1)(e) requires that the first year budget of the condominium corporation be included in the disclosure statement. It was. Within that budget statement, the cost of the lease was accurately disclosed, although it probably should not have been listed under the heading "repairs and maintenance". No other provision of s. 52(6) specifically requires disclosure of the details of an equipment lease of this type.

[32] The respondent argues that the requirement to include a description of the lease in the declaration flows from s. 52(6)(1)(b) of the *Act*. This subsection provides that the disclosure statement must include a general description of the property including the types and number of building units and "recreational and other amenities" together with any "conditions that apply" to the provision of amenities. This, the respondents submit, means that a description of the terms of the lease of the HVAC in the shared facilities must be included. I do not agree. The definition of "amenity" is "a useful or desirable feature of a place" (*Concise Oxford English Dictionary*, 10th ed., *s.v.* "amenity"). When the section refers to "recreational and other amenities", it is referring to amenities such as a party room, concierge, indoor swimming pool, and sauna, as set out in the declaration provided in the present case. The HVAC system is not analogous to these features. Read in context, the term amenties cannot reasonably be interpreted to include an HVAC system. In any event, even if it were an "amenity," "conditions that apply" to its provision, the lease, was disclosed.

[33] The respondent then submits that a more detailed narrative of the lease would come within the required disclosure pursuant to s. 52(6)(1)(a). The first part of that provision requires that a "brief narrative description of the significant features of the existing or proposed declaration, by-laws and rules governing the use of common elements and units" is to be included in the disclosure statement. I would not give effect to this submission. The second part of s. 52(6)(1)(a) specifically addresses leases. The only leases addressed by the section are leases that "may be subject to termination or expiration under s. 39". Section 39 deals with management agreements, agreements for the provision of recreational facilities and leases of premises. The respondent concedes that the HVAC lease is not one to which s. 39 applies. When read in the context of the section as a whole, it is apparent, therefore, that the requirement for a brief narrative description relates to agreements regulating matters of governance, management and the provision and use of the various spaces within the project. The HVAC lease is not such a matter. Further, the fact that the HVAC lease is not one of the leases specifically addressed by the section serves to confirm that an equipment lease of this nature was not the kind of "feature" contemplated by the drafters. In my view, therefore, the section cannot be read so broadly as to require that the details of the lease of some of the mechanical equipment situated in the shared facilities be described.

[34] On the facts of this case, I consider that the information required to be disclosed by the *Act* is the existence and annual cost of the lease. The failure to include other details of the lease in the disclosure statement is not, in my view, of such significance as

to constitute a material misstatement or omission as contemplated by s. 52(5). There was no evidence led at trial that the lease terms are anything other than commercially reasonable terms of a kind one would usually expect to find in an equipment lease. Nor was there any evidence or suggestion that leasing equipment in this way is outside of normal business arrangements in buildings of this nature.

[35] In other words, the purchasers in this case were aware that the equipment would be leased and not owned and were aware of the estimated payments during the first year of the lease. None of the details concerning this lease, such as the term or the fact of a $32,400 purchase option price make this information misleading nor are these details information required or expected when making a decision to purchase. It may well be a different situation if, for example, the cost for the first year disclosed in the budget was significantly different from the ongoing annual cost. Here, the natural inference from the first year budget was that the cost of the lease would be repeated annually. That was accurate.

[36] With respect to the $32,400 due at the end of the lease referred to by the trial judge as a "balloon payment", this payment is simply the optional purchase price to acquire the equipment at the term of the lease if the respondents chose to do so. Again, nothing in the record suggests that the fact or amount of the optional purchase price is out of the ordinary or unexpected in a lease of this type.

[37] In my view, therefore, the failure to provide the details of the lease was not a material omission in breach of s. 52(5) of the *Act*.

b) Did the respondents suffer loss in reliance on these statements?

[38] As set out in *Wellington*, a condominium corporation bringing a claim for damages for breach of s. 52(5) must show reliance by demonstrating that "it cannot reasonably carry out its duty to control, manage and administer the common elements and the assets of the corporation and to manage the property without incurring the expense occasioned by the false, deceptive or misleading statement or information or the expense that should have been disclosed in the disclosure statement" (*Wellington* at pp.20)

[39] In *Wellington* the Court noted that disclosure of the first year's operating budget of the condominium corporation was of particular significance. It was clear to the Court "that the legislature has manifested an intention that purchasers know with a relatively high degree of certainty the expenses they are likely to incur within the first year" (*Wellington* at pp. 20). In that case, although the disclosure statement represented that the condominium corporation would have a live in superintendent, the first year's budget for the condominium corporation did not include the expense that the condominium corporation would have to incur to provide accommodation for this live in superintendent. The Court concluded, therefore, that the condominium corporation could not fulfill its obligations without incurring this undisclosed expense.

[40] In the present case, the first year's budget was accurate. Nothing suggested that the condominium corporation could not fulfill its obligations without incurring expenses in excess of the amounts set out in the budget. The budgeted amount for the lease cost remained constant in each subsequent year and the condominium operated in this way, charging and recovering the annual lease payments without objection for some 6 years. It was only as a result of a building audit that the matter was raised. On the facts of this case, the inability of the respondents to demonstrate the required reliance, in a sense, flows from and confirms the fact that the disclosure statement did not contain a material misstatement or omission.

Other grounds of appeal

[41] In light of my disposition on the first ground of appeal, I need not address the two additional issues raised by the appellant.

Could the respondents succeed at common law?

[42] The respondents argued in the alternative that if its claim pursuant to the *Act* did not succeed, the trial judge could nonetheless have granted judgment based on the common law. In my view, a common law claim by the respondents cannot succeed. Absent s. 52(5) of the *Act*, a condominium corporation cannot bring a claim for misstatement in a disclosure statement. As set out in *Wellington*, there is no contractual relationship between the condominium corporation and the developer, and reliance on the

disclosure statement cannot be shown as the disclosure is made to unit owners and not the corporation. I would not, therefore, give effect to this submission.

CONCLUSION

[43] In conclusion, I would allow the appeal and dismiss the claim. As agreed by the parties, I would award the successful party, the appellant, its costs of the appeal fixed at $20,000 inclusive of GST and disbursements. I would refer the costs of the trial to the trial judge for determination.

"Paul Rouleau J.A."
"I agree D. Doherty J.A."
"I agree S.T. Goudge J.A."
"I agree H.S. LaForme J.A."
"I agree David Watt J.A."

RELEASED: March 8, 2010