Case Name:

GC Capital Inc. v. Condominium Corp. No. 0614475

Between
GC Capital Inc., Plaintiff, and
Condominium Corporation No. 0614475, Defendant, and
Concept Electric Ltd., Third Party, and
Condominium Corporation No. 0614475, Plaintiff by Counterclaim, and
GC Capital Inc., Gateway Macleod Ltd. & Wallace Chow, Defendants by Counterclaim, and
Resiance Corporation, The Whalen Company, Concept Electric Ltd., Hoover Mechanical Plumbling & Heating., Geotech Drilling Services Ltd., and Swiss Solar Tech (SST) Ltd., Third Party Defendants

[2013] A.J. No. 500

2013 ABQB 300

Docket: 1101 15105

Registry: Calgary

Alberta Court of Queen's Bench
Judicial District of Calgary

Master J.B. Hanebury
(In Chambers)

Heard: March 20, 2013.
Judgment: May 15, 2013.

(53 paras.)

Counsel:

Patricia L. Morrison, for the GC Capital Inc.

Alicia Myroon, for the GC Capital Inc.

Fiona G. McLean, for the Condominium Corporation No. 0614475.

Memorandum of Decision

1 **MASTER J.B. HANEBURY**:-- This is an application to dismiss a counter-claim by a Condominium Corporation against an individual director of the developer of the condominium on the basis that the counter-claim discloses no reasonable cause of action or that there is no genuine issue for trial.

2 The developer leased a geoexchange heating and cooling unit to the Condominium Corporation while it controlled the Condominium Corporation. It then transferred the lease to GC Capital Inc. GC Capital commenced this action against the Condominium Corporation, alleging negligence in failing to maintain and repair the geoexchange system as required by the lease.

3 A counterclaim was filed by the Condominium Corporation against the lessor, GC Capital, the developer, Gateway Macleod Ltd., and Wallace Chow, who was a director of both companies.

FACTS

4 The facts revolve around the placement and subsequent lease of the geoexchange unit in the 500-unit condominium building. The issue in this application is whether the counterclaim discloses a cause of action and whether there is a genuine issue for trial in relation to the liability of Mr. Chow as a director of the developer and the lessor, and the operating mind behind the Condominium Corporation.

5 Heating and cooling equipment are normally part of the common property of a condominium and the upkeep and maintenance of the equipment, and its replacement when required, are paid for by the Condominium Corporation. In this case, it was determined by the developer that a geoexchange unit would be installed by it, leased to the Condominium Corporation, and the unit sold to another related company.

6 Mr. Chow and Vinay Ruparell were the sole directors and shareholders of the developer, Gateway Macleod. The company was incorporated for the purpose of the development of the condominium project in 2004. It is alleged that Mr. Chow was the more active director and Mr. Ruparell gave him the authority to sign all necessary documents.

7 The condominium units were marketed by Gateway Macleod's employees.

8 A disclosure book was prepared and printed in July, 2004. Schedule M in the book provides that "[t]he Vendor [Gateway Macleod] may elect in its sole discretion...to utilize geoexchange equipment rather than conventional systems to heat...the project...[and if so] shall cause the Corporation to enter into an equipment lease agreement with a reputable entity (which may include the Vendor or an affiliate of the Vendor)". The schedule included the terms of the proposed lease agreement. At some point a revised disclosure book was prepared.

9 Both versions disclosed an annual lease payment for the equipment by the Condominium Corporation of $250,000.00 plus inflation for a term of 25 years with an option to renew or to purchase the equipment at that time. The Condominium Corporation was to be responsible for its maintenance and repair and the replacement of the equipment and obliged to keep it in "first class condition".

10 Mr. Chow alleges that all purchasers received one or the other of these documents.

11 In fact, two years earlier, in April, 2005, the developer, Gateway Macleod and a company called GC Capital had entered into a Memorandum of Agreement regarding the installation of the geoexchange system. It provided that the equipment would be installed by Gateway Macleod and subsequently purchased by GC Capital for the price of 1.5 million dollars. The agreement included a clause that Gateway Macleod would "cause the resulting Condominium Corporation ... to enter into a lease ... on terms approved by GC (GC Capital) but materially similar to those set out in the form of lease attached."

12 Mr. Chow executed that agreement for both Gateway Macleod as vendor, and GC Capital as purchaser.

13 GC Capital had been incorporated in 2004 to be a "sole purpose long term holding entity, to be the lessor of the geoexchange system and other systems in other development projects, as appropriate." Mr. Chow was shown as the only director and shareholder of GC Capital until 2008, when Asheet Ruparell was shown as having an interest. Mr. Chow alleges other family-related entities were involved in GC Capital and he held his shares in trust for them. In any event, it is not disputed that the families of Mr. Chow and Mr. Ruparell, the two shareholders and directors of Gateway Macleod, were behind GC Capital.

14 On November 20, 2006, the lease for the geoexchange equipment was signed by Wallace Chow for Gateway Macleod and by his brother, Barry Chow, as the director for the board of the Condominium Corporation. The Condo-

minium Corporation had not yet been turned over to the unit owners so Wallace Chow, on behalf of the developer, signed a minute appointing his brother as the sole board member of the Condominium Corporation.[1]

15 The lease was on the terms outlined above. It did not allow for any prepayment with the result that the ultimate cost to the Condominium Corporation over its term will be in excess of $6,000,000.00.

16 The evidence is unclear as to whether this arrangement served any commercial purpose related to the development of the condominiums. The Developer alleges that the geoexchange system was installed to make the condominiums more marketable and for noise abatement. The Condominium Corporation notes that this price would have translated to, on average, an extra $3000.00 per unit being added to the purchase price. The Condominium Corporation alleges that the real purpose of the lease was to create a "cash cow" for the two families behind the development.

17 After the execution of the lease, on December 1, 2006, a Phased Development Disclosure Statement was registered by Gateway Macleod on the Condominium Additional Plan Sheet. It stated that the Vendor may use alternative heating and cooling equipment as referred to in Clause 10(b) of the Offer to Purchase, but no copy of that offer was attached nor did it indicate that the equipment would not form part of the common property. Notice of a security interest in favour of Gateway Macleod and GC Capital was registered on the Condominium Additional Plan Sheet Certificate in January, 2007.

18 Mr. Ryan filed an affidavit on behalf of the Condominium Corporation. He was an original owner, and says that he received the disclosure book in 2007, and at that time it was not made clear to him that the proposed equipment had in fact already been installed. He was not told that the equipment was being sold by the developer to the lessor for a price of $1.5 million, nor was he advised of the inter-relationships among the parties. He states that he was told that the purpose of the proposed geoexchange equipment was to keep the condominium fees down and to be "green".

19 In 2008, two years after the execution of the lease with the Condominium Corporation, the system was sold to GC Capital. The evidence of how payment was made for the system is unclear.

ANALYSIS

20 The arguments of the parties focussed on the application for summary dismissal of the claim against Wallace Chow and therefore this aspect of the application will be dealt with prior to considering whether the pleadings disclose a cause of action against him.

21 The purpose of summary judgment and dismissal is to ensure the courts do not hear actions that have no real chance of success. However, at the same time, the Court is not to lightly dismiss a claim before trial: ***Lameman v. Canada (Attorney General)***, 2006 ABCA 392.

22 The test for summary dismissal is well known: the court must be satisfied that there is no genuine issue for trial. Only if that test is met can an action be dismissed. The Court must be satisfied that there are undisputed facts that necessarily lead to the conclusion that it is plain and obvious the plaintiff's claim will not succeed: ***De Shazo v. Nations Energy Co.***, 2005 ABCA 241, para. 19; ***G.H. v. Alcock***, 2013 ABCA 24, para. 34, 35.

23 When demonstrating that there is no genuine issue for trial, the applicant seeking summary dismissal must meet a high threshold. If the record establishes that there is no cause of action in law or essential elements of the cause of action are missing, then there will be no genuine issue for trial: ***Condominium Corp. No. 0321365 v. 970365 Alberta Ltd.***, 2012 ABCA 26, para. 43.

24 The pleadings in this case allege that the geoexchange system was never in good working order and make numerous allegations against the developer, Gateway Macleod, including: a breach of a legal duty to disclose details of the transaction; a breach of a fiduciary duty to act in the best interests of the owners and the Condominium Corporation; acting unconscionably and in bad faith; and acting toward the owners and the Condominium Corporation in a way that was oppressive or unfair or unfairly disregarded their interests. The pleadings allege that the corporate veil should be pierced and Wallace Chow should be personally liable for these wrongs as he was the director and effective directing mind of the developer as well as of the developer in its capacity as the board of the Condominium Corporation.

25 Wallace Chow argues that the corporate veil can only be lifted in certain very specific circumstances and there is no evidence that those circumstances exist in this case. Therefore, the claim against him should be dismissed summarily.

26 The Condominium Corporation responds that the facts in this case are sufficient to raise a triable issue as to the liability of Mr. Chow for the damages the Condominium Corporation has suffered.

27 A determination of this application for summary dismissal requires a consideration of the law in relation to the duties of a condominium developer and the requirements the law has established for finding a director personally liable for the acts of a corporation.

Duties of a Developer

28 The *Condominium Property Act*, R.S.A. 2000, c. C-22 imposes a duty of fair dealing on every developer. It is found in s. 11 and provides that "[e]very agreement to sell a unit imposes on the developer selling the unit and the purchaser of the unit a duty of fair dealing with respect to the entering into, performance and enforcement of the agreement."

29 Case law has described the duty of a condominium developer to the owners and the Condominium Board as a fiduciary duty. The developer cannot let its own self interest interfere with the interests of the present and future purchasers: ***Matthias v. The Owners, Strata Plan VR. 2135***, 2000 BCSC 519, p. 8, 9; ***Owners of Condominium Plan 752-1207 v. Terrace Corporation (Construction) Ltd.***, (1980) CanLII 1071 (ABQB), paragraphs 37 - 40; ***Owners Strata Plan NW 1942 v. The Owners, Strata Plan NW 2050*** and ***The Owners, Strata Plan NW 2050 v. The Owners, Strata Plan NW 1942***, 2008 BCSC 258, paragraphs 52 - 55; ***The Owners: Condominium Plan No. 992 5205 v. Carrington Developments Ltd.***, 2000 ABQB 573, (Master), paragraphs 12 - 14; ***Gentis v. The Owners, Strata Plan VR 368***, 2003 BCSC 120, para. 24.

30 However, notice to prospective purchasers of circumstances that might otherwise be seen as a breach of the fiduciary duty of a developer is considered when determining whether a breach has, in fact, occurred. However, notice is not always determinative. For example, in ***Terrace Corporation (Construction) Ltd. v. CONDOMINIUM PLAN 752-1207 Owners***, (1983) 26 Alta. L.R. (2d) 147 (Alta C.A.), the Court found that, even though the purchasers were aware of a long-term lease the developer had granted to itself over certain parking areas, the developer could not sell the rights to those parking spaces as the disclosure was insufficient. It had not made it clear that the intention was to permit commercial exploitation by the developer of the parking facilities. See as well: ***York Condominium Corp. No. 167 v. Newrey Holdings Ltd. et al***, [1981] 122 D.L.R. (3d) 280, (Ont. C.A.), p. 289; ***Condominium Corporation No. 0825873 v. 1246153 Alberta Ltd.,*** 2010 ABQB 718; ***Carleton Condominium Corp. No. 106 et al. v. Mastercraft Development Corp. Ltd.***, [1985] 49 O.R. (2d) 638 (Ont. C.A.); ***Peel Condominium Corp. No. 417 v. Tedley Homes Ltd.,*** [1997] O.J. No. 3541 (Ont. C.A.); ***York Region Vacant Land Condominium Corp. No. 968 v. Schickedanz Bros. Ltd.***, [2006] 50 R.P.R. (4th) 79 (Ont. C.A.); ***Condominium Plan No. 86-S-36901 v. Remai Construction (1981) Inc.***, [1992] 1 W.W.R. 66 (Sask. C.A.).

31 Section 67 of the Act provides for certain remedies for "improper conduct", which includes the conduct of the business affairs of a Condominium Corporation or a developer or the exercise of the powers of the board of a Condominium Corporation by a developer, in a manner that is oppressive, or unfairly prejudicial to, or that unfairly disregards the interests of an interested party. "Interested party" is defined to include an owner and a condominium corporation: See the discussion in ***934859 Alberta Inc. v. Condominium Corporation No. 0312180***, 2007 ABQB 640.

32 In ***Metropolitan Toronto Condominium Corporation No. 1272 v. Beach Development (Phase II) Corp.,*** [2010] L.J. No. 5025 (Ont. S.C.), the Condominium Corporation sought a declaration that the developer had acted oppressively. The Court said that the oppression remedy protects only "legitimate" or "reasonable" expectations and the court must address two questions: Does the evidence support the reasonable expectations asserted by the claimant? If it does, then does the evidence establish that the reasonable expectations were violated by conduct that falls within the definition of oppressive conduct?

33 In ***BCE Inc. v. 1976 Debentureholders***, 2008 SCC 69, the Supreme Court of Canada held that it was a reasonable expectation of stakeholders to a corporation that the corporation would act within normal business practices: para. 73. In the context of a condominium corporation this would translate into an expectation that the condominium corporation would enter into a contract that is beneficial for the collective best interest of the owners. When the developer controls the condominium corporation, it too would be impressed with that expectation: ***2475813 Nova Scotia Ltd. v. Rodgers***, 2001 NSCA 12.

34 The argument here is that the Condominium Corporation and Gateway Macleod, who appointed the sole director to the Board, were expected and required to act in the best collective interests of the owners in relation to the contract for the geoexchange unit and failed to do so. At the very least: Gateway Macleod failed to advise of the initial capital cost of the equipment, which would permit anyone with access to an amortization table to realize that the rate of return on that investment to the related company, GC Capital, was not insignificant; and, caused the Condominium Corporation to enter into a contract that may have been to the benefit of others, rather than the owners' best interests.

35 Regardless of the other failures to disclose argued by the Condominium Corporation, the failure to disclose the sale price of the geoexchange unit and the signing of the contract by the Condominium Corporation are arguably improper conduct and breaches of the duties and obligations of the developer.

36 Are these issues sufficient to raise genuine issues for trial in relation to the liability of Wallace Chow?

Liability of a director

37 Historically a corporation has been recognized as a separate legal entity from its officers and directors. The latter are necessary for the corporation to act; however their liability is limited to certain factual situations: ***Hogarth v. Rocky Mountain Slate Inc.***, 2013 ABCA 57, para. 71 et seq.

38 There is the ability, in certain limited circumstances to claim liability against a director personally. As the Supreme Court of Canada acknowledged "[t]here is a persuasive argument that 'those who have chosen the benefits of incorporation must bear the corresponding burdens', so that if the veil is to be lifted at all that should only be done in the interests of third parties who would otherwise suffer as a result of that choice": ***Kosmopoulos v. Constitution Insurance Co.***, [1987] 1 S.C.R. 2, p. 11.

39 Case law has held that those circumstances include: when the corporation is formed to do a wrongful act; when those in control specifically direct the doing of a wrongful act; fraud; and when the corporation is a mere "alter ego" of the controlling shareholder. ***Bond Street Properties Inc. v. Alberta Permit Pro***, 2010 CarswellAlta 1109 (ABQB) para. 27. If a director does something tortious in itself or that demonstrates a separate identity or interest from that of the corporation, the corporations' acts or conduct can become the director's own: ***Stewart v. Enterprise Universal Inc.***, 2010 CarswellAlta 711, (ABQB), paragraphs 62 - 64, 81; ***Blacklaws v. Morrow***, 2000 ABCA 15, para. 41.

40 Director liability is also found in legislation. For example, s. 242(2)(c) of the *Alberta Business Corporations Act*, R.S.A. 2000, c. B-9, permits an oppression claim against a director if the powers of a director are exercised in a manner that is oppressive, or unfairly prejudicial to, or unfairly disregards a shareholder's, director's, officer's or creditor's interests. This is language similar to that used in s. 67 of the Alberta *Condominium Property Act*, in relation to the liability of a developer.

41 Liability has been imposed when directors or officers personally benefited from the corporation's oppressive conduct, or furthered their control over the company through the oppressive conduct. Such cases often involve closely held corporations where a director or officer has virtually total control over the corporation. In such situations he or she has been held personally liable to rectify the corporate oppression: ***Budd v. Gentra Inc.***, [1998] 43 B.L.R. (2d) 27 (Ont. C.A.), para. 52. See as well: ***BCE Inc***. (supra), paragraphs 66 and 82.

42 The Court has had occasion to consider the personal liability of an individual acting on behalf of a condominium developer or as a representative of a condominium corporation when appointed by the developer.

43 In ***The Owners, Strata Plan 1261 v. 360204 B.C. Ltd. and Alan Wilson***, 1995 CanLII 659 (BCSC), a claim was made against an individual who was a director of the corporate entity that had purchased the development and was selling the units. He also acted as agent for the condominium corporation. In that capacity he entered into an improvident agreement in relation to the parking stalls with an inter-related company. The lease was not in the best interests of all of the owners, including the future owners. He was held to have breached his fiduciary duty to the condominium corporation.

44 In ***2475813 Nova Scotia Ltd. v. Rodgers***, 2001 NSCA 12, the controlling mind of the developer, Mr. Brett, was also a director of the condominium corporation and controlled 80% of the votes. He used that majority to obtain authorization to require the entire project be sold to a company under his control at a price he chose. The remaining owners objected to being forced to sell their homes.

45 In that case the Court undertook a lengthy and careful analysis of the development of the concept of fiduciary duty. It found that unit holders had a reasonable expectation that Mr. Brett's power as a director of the condominium corporation or as the controlling mind of the developer would not be exercised "other than in their collective best interest": para. 73. Specifically, said the Court, he had a fiduciary duty to the unit holders not to use his control to authorize a sale of the property where the interests of the unit holders and his interests could conflict: para. 81. He owed a similar duty to the condominium corporation. The Court said that the fiduciary duty is not a duty to act selflessly, nor does it preclude personal profit. What it precludes is profit at the expense of others: para. 87.

46 Wallace Chow was one of two directors of the developer. While it is alleged the other director was also involved in corporate decision making, it is Mr. Chow's signature on the relevant documents. Apparently much of the decision making

was not documented by minutes. It is his brother that he appointed as the sole director of the Condominium Corporation. The two of them executed a contract that, arguably, was not in the best interests of the Condominium Corporation and benefited the families of the two directors of the developer at the expense of the owners.

47 On those facts, it is certainly arguable that Mr. Chow could be personally liable. The arrangement that he allegedly orchestrated was arguably outside of, or contrary to, the legal obligations and duties of the corporate developer, Gateway Macleod, and was of benefit to him personally. A director in a closely held corporation who carries out such actions risks personal liability. In such a situation it can be argued that the corporation was not acting in the manner required of it, but rather, its actions had been hijacked by an individual who caused it to act improperly for the individual's own personal gain.

48 There is a genuine issue for trial.

49 Finally, the applicant argues that the pleadings are insufficient to support a claim against Wallace Chow.

50 There is no doubt the pleadings do require amendment from a factual perspective as it was alleged that Wallace Chow was the sole director of the Condominium Corporation and it is now acknowledged that he had not appointed himself to that position, but his brother.

51 As to whether there are sufficient facts to allege a cause of action against Wallace Chow, case law and the Rules require that when personal liability is claimed against a director the pleadings must reveal the cause of action, and include sufficient particulars where a breach of a fiduciary duty is alleged: Rule 13.7; ***Bond Street Properties***, (supra), para. 90. In the absence of material facts raising a genuine issue for trial, the claim will be dismissed: ***Bond Street Properties***, (supra), ***Stewart and Enterprise Universal***, (supra).

52 A review or the pleadings in this case indicates that the claim against Mr. Chow includes a breach of "legal duties" and improper conduct, and sufficient particulars are alleged to support the causes of action: ***Tottrup v. Alberta (Minister of Environmental Protection***, 2000 ABCA 121, paragraphs 8, 9. While further clarification might be ideal, it cannot be seen as essential.

CONCLUSION

53 The application is dismissed. Costs follow the event, unless the parties speak to costs within 30 days of the date of this decision.

MASTER J.B. HANEBURY

cp/e/qlcct/qlrdp

1 This minute appears to have been signed seven days after Barry Chow signed the lease which raises an issue not before me, but for another day.