

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** JOSEPH MIKHAIL v. ESSEX CONDOMINIUM CORPORATION NO. 47

**BEFORE:** E. Ducharme J.

**HEARD:** June 16, 2006 and April 5, 2007

**COUNSEL:** Rodney M. Godard, for the Applicant

William F. Wright, for the Respondent

**ENDORSEMENT**

[1] The neat, narrow issue raised in this Application is whether a condominium unit owner who sells his or her unit can retain a right to the exclusive use of parking spaces granted to that unit in the Declaration.

[2] When the matter first came on for hearing before me on June 16, 2006, I ordered that Bruce and Mary Jane Flaherty, as parties whose interests are affected by the outcome, be joined as Respondents in this proceeding. To that end, the Application was adjourned.

[3] By letter dated November 30, 2006, counsel for Mr. and Mrs. Flaherty, Frank Ricci of Learnington, Ontario, indicated that his clients would "not take any position on the application on the basis that neither party [sought] costs" against them. At the continuation of the Application on April 5, 2007, counsel for the Applicant and the Respondent confirmed that, regardless of the outcome, neither will seek a costs order against Mr. and Mrs. Flaherty. Counsel also agree that if I should decide the Application in Mr. Mikhail's favour his damages arising from the Respondent's alleged interference with the 24 parking spaces in question are to be calculated on the basis of \$400 monthly from June, 2005 to the present. Against that background, I turn to the question at hand.

[4] The essential facts are not in dispute; they are as set out in paragraphs 1 to 6 of the Applicant's Factum and paragraphs 11, 15, 16, 17, 18 of the Respondent's Factum. These facts reveal that on October 4, 1994, the Respondent was registered as a condominium pursuant to a Declaration and Description registered in the Land Titles Office of Essex.

[5] The condominium's Declaration provides in Article 3.2 that the owners of the dwelling units shall have the exclusive use of those parts of the common elements set out in Schedule "F" of the Declaration. Under Schedule "F", the dwelling unit described as Unit 6, Level 3 ("Unit 6") has the exclusive use of the common elements designated as Parking Spaces P21 and P56 to P79. At the time the condominium was created, the Applicant Joseph Mikhail was the President of the company that developed it. In this role, he saw to it that, in addition to parking space P21, 24 additional spaces were assigned to Unit 6, one of several units he owned in the complex.

[6] In November 1998, Mr. Mikhail sold Unit 6 and its appurtenant common interests to Mr. and Mrs. Flaherty. The Agreement of Purchase and Sale between Mr. Mikhail and Mr. and Mrs. Flaherty contains the following provision:

...

3) Parties acknowledge that vendor will be conveying parking spaces P56 - P79 to *another purchaser* and same will not be included in the conveyance to purchaser here in. The purchaser shall execute documents necessary as required by vendor to give full affect [*sic*] to this provision. [emphasis added]

The other "purchaser" to whom the parking spaces were to be conveyed was Mr. Mikhail.

[7] As part of the transaction, Mr. and Mrs. Flaherty signed an Authorization, authorizing Mr. Mikhail "to take all necessary steps and sign all necessary documents for the purpose of removal of Parking Spaces Numbers P56 to P76 [*sic*] from the appurtenant common interest of Unit 6, Level 3."

[8] Yet the Transfer/Deed registered in the Land Registry Office as Instrument No. 239588 shows that the owners of Unit 6 and its appurtenant common interests are Mr. and Mrs. Flaherty. The registered Transfer/Deed does not exclude the parking spaces in any manner whatsoever.

[9] Instead, Mr. Mikhail and Mr. and Mrs. Flaherty entered into a private contractual arrangement, an unregistered Transfer/Deed of Land, according to which Mr. and Mrs. Flaherty transferred, or purported to transfer, "Parking spaces No. P56 to P78" to Mr. Mikhail.

[10] Counsel for the Applicant concedes that this private agreement between Mr. and Mrs. Flaherty and Mr. Mikhail was, at the very least, "imperfect." But it was more than imperfect. In appropriate circumstances, Mr. and Mrs. Flaherty could never have done more than convey *the exclusive use* of the parking spaces; they could not transfer the spaces themselves. Nonetheless, counsel for the Applicant submits that, imperfections in the unregistered Transfer/Deed aside, it was open to Mr. Mikhail, when he sold Unit 6 to Mr. and Mrs. Flaherty, to reserve to himself the exclusive use of the 24 parking spaces.

[11] Mr. Mikhail's right, his counsel submits, flows from s. 7 of the *Condominium Act, 1998*, S.O. 1998, c. 19, (the "*Act*"), dealing with the requirements for a declaration. Subsection 7(2) stipulates the contents that a declaration must contain. Subsection 7(4) goes on to say that a declaration may also contain other materials, including:

....

- (b) conditions or restrictions with respect to the occupation and the use of the units or common elements; and
- (c) conditions or restrictions with respect to gifts, leases and sales of the units and common interests....

Mr. Mikhail asserts that all he and Mr. and Mrs. Flaherty were doing was agreeing to conditions or restrictions on the use of the 24 parking spaces, a right permitted by s. 4.2(c) of the Declaration.

[12] Subsection 4.2 of the Declaration provides in part as follows:

4.2 Use and Occupation of Parking Units

...

- (c) No owner of a parking unit shall sell, transfer, gift or otherwise dispose of same except to the Declarant, the

Corporation or to an owner of a dwelling unit. [emphasis added]

[13] As is obvious, s. 4.2(c) of the Declaration refers to "parking units." By contrast, P56 to P79 are "parking spaces." And the parking spaces are part of the common elements owned by all the unit owners as tenants-in-common: see Schedule F of the Declaration.

[14] Thus, in the context of this case there are no "parking units" to be owned, and s. 4.2(c) of the Declaration has no application. Moreover, there is no other provision in the Declaration, at Schedule F or elsewhere, that would permit a unit owner to sell a unit yet retain the right to the exclusive use of the parking spaces associated with the unit.

[15] Any change to the exclusive use of parking spaces would require an amendment to Schedule F of the Declaration, in accordance with s. 107 of the Act. According to s. 107(2)(d), any such amendment requires the consent of 90% of unit owners. The relevant provisions of s. 107 are as follows:

**Amendments with owners' consent**

107(1) The corporation shall not amend the declaration or the description except in accordance with this section.


**Conditions**

(2) The corporation may amend the declaration or the description if, ...

(d) the owners of at least 90 per cent of the units at the time the board approved the proposed amendment have consented to it in writing, if it makes a change in a matter described in clause 7(2)(c), (d) or (f) or 7(4)(e).

[16] In this case, the Declaration explicitly provides that the right of exclusive use belongs to the owner of Unit 306. The Declaration has not been amended to stipulate otherwise. Therefore, there was no legal basis for the Applicant to retain the right to the exclusive use of the impugned parking spaces after he sold Unit 306 to Mr. and Mrs. Flaherty.

[17] In the result, and for the foregoing reasons, the Application is dismissed with costs to the Respondent on a partial indemnity basis. If the parties are unable to agree upon an appropriate quantum of costs, counsel may arrange with the trial coordinator an appropriate time at which the issue can be addressed.

  
Edward W. Ducharme  
Justice

**DATE:** April 16, 2007

COURT FILE NO.: 05-CV-6040CM  
DATE: 20070416

**SUPERIOR COURT OF JUSTICE - *ONTARIO***

**RE:** MIKHAIL v. ESSEX  
CONDOMINIUM

**BEFORE:** E. Ducharme J.

**COUNSEL:** Rodney M. Godard, for the  
Applicant

William F. Wright, for the  
Respondent

---

**ENDORSEMENT**

---

E. Ducharme J.

**DATE:** April 16, 2007