2004 SKQB 50

Q.B.G. A.D. 2000
No. 2925 J.C.S.

IN THE QUEEN'S BENCH

JUDICIAL CENTRE OF SASKATOON

BETWEEN:

DAVID LITTLE and MARGARET LITTLE

PLAINTIFFS

- and -

THE OWNERS: CONDOMINIUM PLAN 82S15667

DEFENDANT

AND BETWEEN:

Q.B.G. A.D. 2001
No. 110 J.C.S.

IN THE QUEEN'S BENCH

JUDICIAL CENTRE OF SASKATOON

BETWEEN:

JENNIE SIGURDSON

PLAINTIFF

- and -

THE OWNERS: CONDOMINIUM PLAN 82S15667

DEFENDANT

R.W. Danyliuk for the plaintiffs

R.L. Borden for the defendant

JUDGMENT FOLEY J.

February 13, 2004

[1] These actions were tried together under the simplified procedure rules. The plaintiff, Jennie Sigurdson, purchased unit 16 in the Discovery Park condominium complex on January 30, 1998 with a possession date of March 28, 1998. David and Margaret Little (the Littles) purchased unit 7 in the same complex in June 1998 and took possession on August 27, 1998. The vendor of the units was the developer, Remai Construction (1981) Inc. (Remai). Each purchaser of a unit also purchases a fractional share of the common property.

[2] Both sale transactions were subject to a "Schedule C" which incorporated standard conditions for the sale of a condominium unit. The schedule obliged Remai to provide purchasers with a copy of the condominium corporation's bylaws, its most recent financial statement and budget as well as particulars of any common expense, reserve fund and extraordinary contributions levied respecting the property. Remai also undertook to provide purchasers with an estoppel certificate in statutory form issued by the condominium corporation.

[3] Section 64 of *The Condominium Property Act, 1993*, S.S. 1993, c. C-26.1 (the Act), mandates the contents of the estoppel certificate as:

> 64(1) . . .
>
> (a) the amount of any contribution levied on the owner;
>
> (b) the manner in which the contribution is payable;

> (c) the extent to which the contribution has been paid; and
>
> (d) any other matters required by the form.
>
> (2) A corporation that provides an estoppel certificate pursuant to subsection (1) is estopped from denying the matters certified in it.

[4] The estoppel certificate, in the form required by the regulations, as provided to Ms. Sigurdson (the Littles), stated in part:

> a) The amount of the common expense contribution levied respecting the unit: **$188.42** (**$217.53**) per month.
>
> b) The amount of the reserve fund contribution levied respecting the unit: **$48.58** (**$56.47**) per month.
>
> c) The total amount of the fees payable for this unit are **$237.00** (**$274.00**) per month, payable on the first of each and every month.
>
> . . .
>
> g) The amount of any extraordinary contribution levied on the unit and the extent to which it has been paid: **None** (**$ None**)
>
> 2. The corporation is not aware of any default by the present owner of the unit in fulfilling any of the owner's obligations arising from membership in the corporation and ownership of the unit except as specified above or noted below: **None** (**None**)
>
> . . .
>
> 5. Since the date of the last audited financial statements of the corporation there has been no material adverse change in the assets or liabilities of the corporation except as follows: **None**

> 6. The corporation has not taken any action nor has it received any pending proceedings:
> . . .
> b) to authorize any substantial change in or addition to the common facilities or any other substantial change in the assets of the corporation; . . .

[5] In May 1999, the 46 unit holders in the complex were notified by The Owners that:

> At the Board of Directors Meeting on May 11, 1999, a motion for a Special Assessment was passed, in accordance to the Engineers Report by R.G. Cooper Architects in regard to the balconies and the Report on the Roof by V.H.P. Consulting, to conduct and complete the recommended repairs.

[6] The special assessment was necessary to cover the estimated cost of balcony repairs of $250,000.00 and roof repairs of $47,000.00 as set out in the R.G. Cooper report of April 1999. Each unit holder was obliged to pay its proportional share of the common property repair cost. The assessment to the Sigurdson unit was $7,535.97 while that against the Littles unit was $8,760.07.

[7] Neither Ms. Sigurdson nor the Littles object to paying the portion of the assessment relating to the roof repair but say that the 1998 estoppel certificate issued by The Owners insulates them from the balcony repair portion of the assessment. They rely primarily on para. 5 of the certificate by which The Owners certify that, since the date of the last audited financial statement, “there had been no material adverse change in the assets or liabilities of the corporation”.

[8] The plaintiffs point to The Owners minutes and records as demonstrating that, commencing in 1996, concerns had arisen over the integrity of stucco on the balconies. The Friggstad architectural firm was retained in August 1997 to investigate the problem and reported in September that:

> It is my opinion that the stucco problems you are encountering are a result of moisture collecting within the void of each balcony throughout winter months from moist humid air inside the building which is escaping into the balcony cavities because the sealant junction between the interior layer of the exterior wall is not adequately sealed to the structural systems. . . . The failure of the stucco is a result of moisture corrosion of the fasteners and suspension systems, as well as moisture buildup within the stucco system causing popping of the outer layer of the stucco cladding.
>
> . . . The air barrier in the present building is probably discontinuous at every floor line, and should be corrected to eliminate the movement of warm moist air into the wall cavity and balcony cavities. . . .
>
> It may also be necessary to insulate portions of the cantilevered balcony structural systems to reduce thermal bridging. This could be accomplished by a urethane foam spray on the exterior portion of the balcony beams.
>
> It will be necessary to remove all stucco from the project that is found to be not secured. The Balcony voids should be ventilated which could be done intermittently with a portion of the stucco cut out and a metal vent installed in the cut opening.
>
> There are other concerns that should be addressed as well to ensure the long term performance of the balcony. The deck should be covered with a waterproof membrane that laps over the outside edges and laps under a through wall flashing

> at the wall area. This will stop moisture from direct penetration. The present conditions allow water to penetrate freely at the wall, slab, and outside edges. I have photographs of all of these conditions and would be pleased to discuss these with you.

[9] On October 2, 1997 it is recorded that the Friggstad proposal was sent out for quotations but that "nine balconies plus two penthouses are now in dire need of repair". The minutes of December 4 indicates that repairs are ongoing. At a special board meeting of January 28, 1998, it was reported that all balconies had been caulked at an overall cost of $4,655.00. Stucco repair, as well as the replacement and painting of railings, were topics of discussion at both meetings in April and August 1999.

[10] At a meeting of January 14, 1999 The Owners decided to obtain a report on further possible repairs for both roof and balconies and on February 11, 1999, it is recorded:

> George submitted a quote from R.G. Cooper Architect Ltd. re stucco falling from the balconies. George said the balconies were a major concern; further deterioration creates danger, we could be held liable.

[11] A special meeting was called on April 22, 1999 to discuss the Cooper report which had concluded from its investigation that despite the sealing efforts made to the balconies by The Owners in the previous year, the building envelope still allows building moisture to infiltrate the balcony structure which, combined with water from poor balcony drainage, had initiated a rusting of stucco wire and the resultant stucco loss. The report also raised safety concerns with respect to balcony railings and also identified some roof defects.

[12] The estoppel certificate provided to Ms. Sigurdson is dated January 27, 1998. That for the Littles' unit is dated June 18, 1998, but there is some dispute as to when the estoppel certificate was actually received by them. In fact, the actual date of receipt makes no difference as there was no new knowledge acquired by The Owners in any interim period.

[13] The issues to be decided are:

(1) whether the estoppel certificates issued by The Owners to each of plaintiffs was inaccurate at issuance and whether, by that issuance, The Owners were in breach of any obligation;

(2) even if the answers so given above are in the negative, whether a separate duty of care to disclose latent defects arises and if so, whether that duty was breached by The Owners.

THE ESTOPPEL CERTIFICATE

[14] The plaintiffs' position is that prior to the issuance of the certificates The Owners were aware of balcony deficiencies and the need for repair. Consequently, the circumstances which gave rise to the 1999 special assessment were subsumed in and negated by the state of affairs certified by The Owners in the estoppel certificates. They also say that balcony defects ought to have been disclosed in the estoppel certificates (or alternatively disclosed as part of a separate duty to disclose) and, not having been so disclosed, The Owners are estopped from imposing the assessment on the plaintiffs (or alternatively, are liable for damages in the same amount as the assessments now made).

[15] The Owners for their part say that the facts set out in various minutes and the Friggstad report of September 1997, demonstrate that the certificate provided to Ms. Sigurdson for her possession date of March 28, 1998 and that provided to the Littles for their possession date of August 27, 1998 were both factually accurate and consistent with its statutory obligations. They deny any other duty of care.

ANALYSIS

[16] The defendant, The Owners, is a non-profit corporation, the shareholders of which are the individual unit holders. Through a board of directors it administers and enforces the bylaws and has control, management and administration of the units as well as of the common property. It is obligated to keep the common property in a good state of repair and to provide a statutory estoppel certificate upon request.

[17] The prospective purchaser is naturally interested in ascertaining the nature of the financial obligations to be assumed on purchase of a unit. Concern needs to be had not only for the financial obligations pertaining to the actual unit to be purchased but also for those that arise for a tenant in common of the entire common property of the condominium complex. This latter information is primarily within the knowledge and control of The Owners.

[18] The Owners have no legal interest in the units or the common property. Whatever assets it has relate solely to its role as manager of the complex and trustee for the condominium fees. The Act therefore requires The Owners to supply a certificate in statutory form detailing the state of common expense and reserve funds, any special

assessments levied against the unit as its fractional share of the complex as a whole. It must declare whether, since the date of the last audited financial statement of the corporation, there has been a material adverse change in its assets or liabilities.

[19] The last financial statement (albeit not audited) generated prior to either estoppel certificate issuing was that of August 31, 1997 which covered the eight-month period commencing January 1, 1997. Income for the corporation was $107,978 and total expenses were said to be $89,359. Of the balance, $10,800 was allocated to the long term reserve fund and $7,819 to operating reserve. The total long term reserve was $44,907.88. The 1998 budget projected a total income of $159,000 with expenses of $128,512 projecting a transfer to reserve of $29,386 of which some $10,000 was to be spent for balcony repairs.

[20] The plaintiffs bear the evidential onus to demonstrate that the estoppel certificate misrepresented the state of affairs in that there had in fact been a material change to the corporation's financial status. That onus was not discharged.

[21] The events surrounding the balconies, as they unfolded in 1997 and 1998 cannot reasonably be said to have brought about or warranted modification of the "assets or liabilities" of The Owners. The concern over the balcony and stucco which culminated in the Friggstad report of September 12, 1997 did not give rise to major or any significant cost. The property management report to the board of directors of November 6, 1997 records that, "Chris Styranka has begun work on the balconies. Currently he is caulking the balconies. When he begins the work on the balconies that require repairs he will contact me so that George, Ray and I can take a look and decide if there is other work to be done beyond what is outlined."

[22] It is evident from the January 1998 repair invoices that the requisite caulking was done at modest cost. Nothing transpired thereafter and prior to issuance of the certificate to Ms. Sigurdson or the certificate to the Littles which would have altered or raised the level of The Owner's concern such that The Owners' financial statements or position could be reasonably said to have been significantly effected.

[23] One can well appreciate the dismay and consternation provoked by the 1999 special assessment. However, it is only with the benefit of hindsight and armed with the Cooper report that the events of 1996 and 1997 and the Friggstad report might now be characterized as the tip of the iceberg.

[24] The estoppel certificate needs to be viewed in context as a legislatively mandated financial snapshot. It is nothing more - or less - than what it purports to be - a representation of present fact (at issuance date) from which The Owners will not be allowed to resile. This narrow characterization as to what indeed is "certified" is borne out by the analysis by Master Funduk in *Condominium Plan 832 1384 v. McDonald*, 1998 ABQB 677, [1998] A.J. No. 885 (Q.B.). He concluded that an estoppel certificate was to be considered in light of the fact that the owners are to certify what exists at the time of certification not what may happen in the future albeit a reasonable probability of a new assessment.

[25] In sharp contrast is the present Ontario requirement. There the "estoppel certificate" has been replaced by the "states certificate" through the *Condominium Act, 1998*. It requires the certificate to contain clauses warranting that the corporation has no knowledge of circumstances that may result in a common expense increase except as may

be detailed in the current budget, as well as a representation that the corporation is not considering any substantial addition, alteration improvement or renovation to the common elements nor any substantial change in the assets except as set out in the disclosed budget.

[26] These Ontario requirements are far more onerous than those required of the certificate under consideration in this case. Cases such as *Stafford v. Frontenac Condominium Corp. No. 11*, [1994] O.J. No. 2072 (Gen. Div.); *Lucas v. Duro & Shea*, [1985] O.J. No. 1833 (Prov.Ct. - Civil Div.), *Armstrong v. London Life Insurance Co.*, [1999] O.J. No. 3507 (S.C.J.); and *Armstrong v. London Life Insurance Co.*, [2000] O.J. No. 997 (S.C.J.), aff'd [2001] O.J. No. 2080 (C.A.), are all explainable on the basis of the very different stringent statutory obligations. Even these cases demonstrate however that the disclosure statement must be defective in a material respect and that the onus is on the purchasers to demonstrate that the disclosure statement fails to satisfy the governing statute before the certificate or assessment can be challenged.

[27] It is noteworthy that Bill 27, Chapter 19, *The Condominium Property Amendment Act, 2003*, introduces a concept of mandatory reserve fund studies but does not change or modify the existing estoppel certificate requirements, nor extend The Owners' obligation to disclose. If modification or extension is warranted in Saskatchewan, to emulate Ontario, legislative action would be required.

[28] The evidence in this case fell far short of demonstrating the requisite material financial change against which the certification of "none" provides an estoppel to or protection from, the subsequent special assessment.

[29] Nor does characterizing the stucco/support issues as “latent” or “safety related” give rise to a cause of action in damages. The Owners are not a vendor. Its responsibility is to meet the statutory standard. Its certification met that standard. It owed no additional duty of care to the plaintiffs. If I am in error in this regard I would have concluded that The Owners were not in breach of any duty of care owed the plaintiffs as not only was there no evidence of a standard or its breach, but the events of 1999 were not foreseeable at the time of the 1998 report and its consideration.

[30] The actions are consequently each dismissed with costs.

_____J.