Court of Queen's Bench of Alberta

Citation: Maverick Equities Inc. v. Condominium Plan No. 942 2336, 2010 ABQB 179

Date: 20100315
Docket: 0503 18311, 0503 18193
Registry: Edmonton

Between:

Action No. 0503 18311

Maverick Equities Inc.

Applicant

- and -

The Owners: Condominium Plan No. 942 2336

Respondent

And Between:

Action No. 0503 18193

The Owners: Condominium Plan No. 942 2336

Applicant

- and -

Maverick Equities Inc.

Respondent

Memorandum of Decision
of the
Honourable Madam Justice J.B. Veit

Summary

[1] In 2005, Maverick Equities Inc. purchased a condominium unit in an industrial complex. In July 2004, the condo corporation had adopted new rules on proposed alterations to the building structure. Prior to the adoption of those rules, 82 of the units in the complex had substantially modified their units by adding a mezzanine or second floor. However, Maverick's request for approval of its plans to add a mezzanine to its unit was denied. The Alberta Court of Appeal referred the matter to this court "for an adjudication of the allegation that the Board has unreasonably withheld its consent".

[2] This court concludes that, as of this hearing, two of the original grounds for refusal, namely the insufficiency of Maverick's building plans and Maverick's refusal to abide by parking restrictions, were unreasonable. The Condo Board is no longer pressing those grounds.

[3] However, it was not unreasonable for the Board to insist upon the third of the original conditions for consent by requiring an owner who wished to alter property which it does not own, here the roof of the complex which was unitized property (a variant of common property), and which might even be a structural element of the unitized property, to pay a $5,000.00 damage deposit which would only be returned if the premises were returned to their original condition.

[4] A court must show deference to the Board's right to make reasonable decisions. In this context, a Condo Board is a "consensual tribunal". Here, the initial damage to the roof caused by Maverick's trespass to the unitized property is an intelligible and transparent justification for the damage deposit.

Cases and authority cited

[5] **By the Applicant (Maverick Equities Inc.):** ***Maverick Equities Inc. v. Owners Condominium Plan No. 942 2336***, 2007 ABQB 314; ***The Owners: Condominium Plan No. 942 2336 v. Edmonton (City)***, 2007 ABCA 314; ***Maverick Equities Inc. v. Owners Condominium Plan No. 942 2336***, 2008 ABCA 190; ***Maverick Equities Inc. v. Owners Condominium Plan No. 942 2336***, 2008 ABCA 221; ***Ryan v. Law Society (New Brunswick)***, [2003] 1 S.C.R. 247 (S.C.C.); ***Calgary (City) v. Alberta (Human Rights & Citizenship Commission)*** 2007 ABQB 485; ***Zurich Canadian Holdings Ltd. v. Questar Exploration Inc.*** (1999) 171 D.L.R. (4th) 457 (Alta. C.A.); ***Re: Hayes Forest Services Ltd.***, 2009 BCSC 1169; Sections 28(7) and 67 of the *Condominium Property Act*, R.S.A. 2000, c. C-22.

[6] **By the Respondent (The Owners: Condominium Plan No. 942 2336):** ***934859 Alberta Inc. v. Condominium Corporation No. 0312180***, ABQB 640; *Condominium Property Act*, R.S.A. 2000, c. C-22.

[7] **By the court:** *On the issue of returning the matter to the Condo Board:* ***Noble v. Keho Holdings Ltd.*** (1987), 78 A.R. 131 (C.A.); ***BCE Inc. v. 1976 Debentureholders***, 2008 SCC 69, [2008] 3 S.C.R. 560; ***934859 Alberta Inc. v. Condominium Corporation No. 0312180***, 2007 ABQB 640, 434 A.R. 41; ***Condominium Plan 932 2887 v. Redweik***, 43 R.P.R. (2d) 154, [1994] A.J. No. 1020 (Q.B. Master); ***York Condominium Corp. No. 382 v. Dvorchik***, 12 R.P.R. (3d) 148, [1997] O.J. No. 378 (C.A.); ***Condominium Plan 7722911 v. Marnel***, 2008 ABQB 195, 69 R.P.R. (4th) 132; ***Condominium Plan No. 8111679 v. Elekes***, 2003 ABQB 219; ***Condominium Plan No. 8022962 (c.o.b. Willow Ridge) v. Malinowski***, 2004 ABQB 633; ***Condominium Corp. No. 8110264 v. Farkas***, 2009 ABQB 488; ***Metropolitan Toronto Condominium Corp. No. 601 v. Hadbavny***, [2001] O.T.C. 770 (S.C.J.); ***Kaplan v. Canadian Institute of Actuaries*** (1994), 161 A.R. 321 (Q.B.) aff'd 206 A.R. 268 (C.A.); ***Alberta Union of Provincial Employees v. Alberta***, 2002 ABCA 202, 312 A.R. 9 at para. 22; ***Smith v. Alberta (Ombudsman)***, 2003 ABQB

488, 338 A.R. 113; ***Brewer v. Fraser Milner Casgrain LLP***, 2008 ABCA 160, 432 A.R. 188; ***R. v. Thomson*** (2005), 74 O.R. (3d) 721 (C.A.); ***R. v. Whynot*** (1994), 129 N.S.R. (2d) 347 (C.A.).

[8] *On the standard of reasonableness:* ***Dunsmuir v New Brunswick*** 2008 SCC9, [2008] 1 S.C.R. 190

[9] *On the distinction between a damage deposit and a penalty:* ***Lapping v Homburg L.P. Management Inc.*** 2009 NSSC 346, [2009] N.S.J. No. 548.

Appendix A: *Extract from the condominium corporation's Rules and Regulations relating to damage deposits*

1. Background

[10] On July 28, 2005, Maverick became the owner of a condominium unit, legally described as Condominium Plan 9621123, Unit 93. The condominium property, which is a business or industrial condominium complex rather than a residential complex, is located in south Edmonton, Alberta.

[11] What would normally be common property in a condominium situation has, in this complex, been unitized, which is a sub-set of common property. In this condominium, a unit owner's property rights end just inside that unit's walls, floors and ceilings. The unit owners are not tenants in common with respect to the walls, floors, ceiling or physical structure. Where the condo association's by-laws refer to common property, they are, of course, referring to the unitized property.

[12] The Condominium Corporation was substantially constructed in 1993; it is composed of a number of bays in which each unit has very high ceilings. At the time of Maverick's purchase, the majority of the units had been improved, many in a fashion similar to Maverick's intended improvements; 82 of the 132 units had been so improved. Since Maverick's improvements, one additional condo unit has built a mezzanine floor.

[13] In October, 2005, Maverick applied to the City of Edmonton for a development permit and a building permit and provided the City of Edmonton with all of the necessary documents and drawings as required. The City of Edmonton approved the development and building permits.

[14] On October 12, 2005, some members of the condominium corporation's Board refused Maverick's application to make interior alterations in Maverick's Unit, including, the construction of a mezzanine level on the basis that Maverick "failed to provide the Board with Engineered Drawings". The issue of whether this was a true meeting of the Board is discussed below.

[15] In October, 2005, the Condominium Corporation filed an appeal of the 2005 development permit granted to Maverick to the Subdivision and Development Appeal Board of the City of Edmonton.

[16] On November 9, 2005, the SDAB heard the appeal of the Condominium Corporation. The appeal was allowed in part; the development permit was granted subject to the deletion of the proposed mezzanine level.

[17] On May 15, 2007, the Honourable Mr. Justice R.P. Belzil issued a written decision (*Maverick Equities Inc. v. Owners: Condominium Plan No. 942 2336*, 2007 ABQB 314) which, among other things, stated that the Rules and Regulations enacted by the Condominium Corporation were not binding as against Maverick, that Maverick would be entitled to proceed with its interior alterations, including, but not limited to, the construction of a mezzanine level, and cancelled the injunction which had been granted by the Honourable Mr. Justice M.A. Binder in early November, 2005.

[18] In the spring of 2007, Maverick applied for another development permit. The City of Edmonton issued a development permit to Maverick allowing Maverick to proceed with its interior alterations, including, but not limited to, the construction of a mezzanine level.

[19] The Condominium Corporation filed another appeal to the SDAB in respect of the 2007 Development Permit. The SDAB appeal hearing was heard on May 31, 2007. The SDAB rendered its written decision on June 15, 2007; it denied the Condominium Corporation's appeal. As a result, from the perspective of the municipal authorities, Maverick was permitted to proceed with its interior alterations, including, but not limited to, the construction of a mezzanine level.

[20] The Condominium Corporation sought leave to appeal the SDAB 2007 Decision to the Court of Appeal. The Condominium Corporation's application for leave was heard on September 18, 2007. The Honourable Mr. Justice K. Ritter rendered his decision on October 15, 2007 (*The Owners: Condominium Plan No. 9422336 v. Edmonton (City)*, 2007 ABCA 314). Leave to appeal was refused as the Honourable Mr. Justice K. Ritter was not convinced that the Condominium Corporation's "proposed ground of appeal [had] a reasonable chance of success, nor that there [was] sufficient importance to warrant further appeal."

[21] On May 14, 2008, the Condominium Corporation made an application before a Justice of the Court of Appeal in Chambers seeking a stay of the judgment of the Honourable Mr. Justice R.P. Belzil dated May 15, 2007. In his decision (*Maverick Equities Inc. v. The Owners: Condominium Plan No. 942 2336*, 2008 ABCA 190), the Honourable Mr. Justice Jean Côté granted a stay of the declaration and a stay of enforcement of the judgment granted by the Honourable Mr. Justice R.P. Belzil. The Condominium Corporation was awarded costs taxed on Column 2, plus reasonable disbursements. Maverick has paid the costs in full as referenced in the decision of the Honourable Mr. Justice Jean Côté.

[22] On June 11, 2008, the Alberta Court of Appeal rendered its decision (*Maverick Equities Inc. v. Owners: Condominium Plan 942 2336*, 2008 ABCA 221). The appeal of the Condominium Corporation was allowed and the order of the Honourable Mr. Justice R.P. Belzil was set aside. The Court of Appeal ordered that this matter return to another judge of the Court of Queen's Bench for an adjudication of the allegation that the Board of the Condominium Corporation has unreasonably withheld its consent to allow Maverick to continue with its development/construction of the Maverick's Unit.

[23] The Condominium Corporation was awarded solicitor and client appellate costs, as provided for in the Bylaws. Maverick has paid the costs in full as referenced in the decision of the Court of Appeal (*Maverick Equities Inc. v. Owners: Condominium Plan 942 2336*, 2008 ABCA 221).

[24] The costs relating to the Court of Queen's Bench matter will be dealt with in this hearing.

[25] The mezzanine level in Maverick's Unit has been fully constructed.

2. Did the Condo Board deny Maverick's request?

[26] The Condo Board denied Maverick's request.

[27] The only evidence about the Board's role in the original denial of Maverick's request establishes that what amounted to an "informal meeting" of some members of the Condo Board considered Maverick's request for alterations and purported to impose certain conditions on Maverick. No notice had been given of a meeting, no quorum of the Board was present, and no minutes of the meeting were kept.

[28] A Condo Board is an elected governing body. Its only authority to act is tied up in its status as a governing body. In order to exercise its authority, a Condo Board must respect the system under which it was appointed. Individual members of a Condo Board have no authority; they cannot purport to act on behalf of the Board.

[29] The importance of a Condo Board's decisions, as recorded in its minutes, is underlined by this very application. In the context of the relationship between an individual condo owner and the other owners in the complex, it is of course crucial that part of a prospective condo owner's due diligence will include a review of the condominium's constitutional framework to which the new owner will be adhering. That review will include not only the regulations and by-laws of the condominium complex, but also the minutes of Condo Board meetings: a review of those minutes is essential to the prospective owner's understanding of how the Board is interpreting and applying the by-laws and other condo documents. From the perspective of the Condo association, it is perhaps entitled to assume that any new condo owner will have reviewed all of the condominium documents so that a prospective owner is moving towards adhesion with an understanding of the rules respecting for example, pet ownership, parking, and skylights. If the Condo Board is not having proper meetings and keeping proper records including minutes, it

is subverting the transparency commitment which exists between the condominium association and the various owners.

[30] It is clear that if the Board had failed to respond to Maverick's request for approval, that failure to reply would have constituted an unreasonable withholding of consent. However, as the cases cited at the outset suggest, it is possible that if the Board had not answered Maverick's request, the only relief the court might have granted was to have returned the matter to the Board with a requirement that the Board provide an answer to Maverick.

[31] In the circumstances here, although the Board did not itself originally deny Maverick's application, the history of the proceedings since the problem first arose in 2005 establishes that the Condo Board has, implicitly, adopted the actions of the members of the board, and has thereby denied Maverick's request on one of the original three grounds. The parties have formally agreed on this factual determination.

3. Was the Board's denial of Maverick's request unreasonable?

a) The first two grounds for denial: building plans and parking

[32] The history of the dealings between the parties underscores the importance of building plans, especially in circumstances such as these where the condo board itself is unlikely to have any building expertise. Case law establishes that municipal approval of building plans does not automatically guarantee approval of building plans by a condo board. An analogy could be drawn to architectural covenants that run with the land: the owner of a building that is subject to a covenant which runs with the land must comply with the covenant even though the covenant contains terms, such as standards for colour or design, that are imposed over and above municipal building codes. Here, the mere fact that Maverick's building plans had been approved by the City of Edmonton did not necessarily mean that the condo board's rejection of those plans was unreasonable. However, by July 30, 2009, the Condo Board had confirmed that Maverick's construction drawings were acceptable. Therefore, the condominium association is no longer advancing a failure to provide adequate building plans as a reason for denying Maverick's proposal.

[33] Similarly, even if a condo association's rules were never adopted as by-laws, it is not necessarily unreasonable for the condo board to require compliance with one of its rules as a condition for granting approval of a request. In a major commercial/industrial complex such as this one, each of the owners will have an interest in ensuring that parking privileges are fairly distributed. Here, real parking restriction issues arose: what were the qualifications of the condo board's parking expert; how were the new parking standards adopted; was it fair to grandfather all previous units; what type of inspection was being done to determine if the units complied with the standards set in the parking rules, etc. In the event, however, the condominium association is no longer advancing a failure to agree to parking restrictions as a reason for denying Maverick's proposal.

[34] At this hearing, the condo board relies on only one basis for denying Maverick's proposal, and that is Maverick's refusal to pay a "damage deposit" of $5,000.00. Using the Court of Appeal's language, the task of this court is to determine whether the Board has unreasonably withheld its consent from Maverick by insisting on the payment of a $5,000.00 damage deposit.

b) The third ground for denial: damage deposit

[35] Maverick, which is the party asserting that the Board's withholding of consent is unreasonable, has the burden of proving that assertion. The comments made by Binnie J. in ***Dunsmuir***, where he stated that a decision of an independent body which is being reviewed by a court on a standard of reasonableness is presumed reasonable until proven otherwise are applicable by analogy here.

[36] In assessing whether Maverick has met the burden, the court must first establish the content of the Board's insistence on the damage deposit.

[37] It is clear that Maverick's building plans required alteration of the unitized property, including alteration to the roof, the floors, and the walls, as well as changes to the HVAC system of the unitized property. By-law 2.02 of this condominium corporation includes the following terms:

> An owner shall not:
> . . .
>
> (f) Do any act or permit any act to be done or permit its Unit to be altered in any manner which will alter the exterior appearance or the structure comprising its Unit or any other Units or which will affect the fire rating or soundproofing of a Unit, or of an adjoining Unit;
>
> (g) Make any changes to the floor, Party Walls, in the plumbing or heating, air conditioning, mechanical or electrical systems within or outside any Unit without the prior written consent of the Board;
>
> (h) Make any change to an installation upon the common property or maintain, decorate, alter or repair any part of the common property, except for maintenance of those parts of the common property which such Owner has the duty to maintain, without the prior written consent of the Board.

[38] The Condo Board's Rules relating to damage deposits for those owners who alter the common property of the condominium association are set out in Appendix A hereto.

[39] When examined by Maverick about the status of the damage deposit, a representative of the condo board said:

> Q. And is the [damage deposit] then returned to the unit owner once you have done the inspection?
> A. The money is held by the corporation as long as the alteration exists.
> Q. So in other words forever?
> A. As long as the alteration exists.
> . . .
> Q. And you . . the $5,000 deposit would remain in the hands of the corporation for as long as the alterations remained in existence, correct?
> A. To the corporation property, yes.
> Q. So someone adding a second floor and a month later deciding to seel their unit, as long as that second level is staying there, that $5,000 will never, ever be returned to that unit owner, correct?
> A. Correct.

[40] When examined by Maverick about the genesis of the Rules relating to damage deposits, the same individual responded:

> A. They came about because the corporation had problems with unit owners doing alterations to their unit or with corporation property and the corporation incurring costs to repair them.

[41] Among other things, this extract establishes that Maverick knew of the existence of the Rules including the Rules relating to damage deposits; indeed, the evidence establishes that, prior to the sale of Maverick's unit closing, Maverick was given a copy of the corporation's Rules.

[42] Maverick has informed the condo board that Maverick's contractor will provide to the condo association a warranty on the work done on common property and that the warranty will be for a period of one year.

[43] Maverick takes the position that the $5,000.00 is not a damage deposit; Maverick argues that a deposit is "simply a confirmation that a contract will be performed in accordance with its terms". Maverick states that the $5,000.00 here is a non-refundable fee which is unreasonable and unfair. It advances two main arguments: in order to be a "deposit", there must be provision for the return of the money to Maverick, and the Condo Board has not established any criteria for the use or return of the money. In order to be fair, a term requiring Maverick to make a damage deposit would have to take into account the way in which the Board has dealt with other owners who have made similar improvements. In particular, Maverick argues that its improvements have cost Maverick at least $100,000.00 and that it is unreasonable to require them to tear out all of those improvements in order to get the return of a $5,000.00 deposit. As to the concern about damage, Maverick has informed the Condo Board that Maverick's contractor will, as is customary, provide Maverick with a one-year warranty that will cover the work done to Maverick's unit and any work done relating to the common property. Overall,

Maverick states that a $5,000.00 damage deposit was, in reality, a non-refundable development fee which the condominium corporation would be free to spend at their discretion.

[44] The weight of Canadian jurisprudence requires courts to give considerable deference to condominium boards. Our own Court of Appeal, in these very proceedings, stated:

> The Board is entitled to some considerable scope as to how it will exercise his discretion in granting or withholding consent, and there is nothing objectionable to the Board setting down rules and regulations as to how its discretion will be exercised in the normal course.

[45] And the Ontario Court of Appeal held in ***Dvorchik***:

> . . . A court should not substitute its own opinion about the propriety of a rule enacted by a condominium board unless the rule is clearly unreasonable or contrary to the legislative scheme. In the absence of such unreasonableness, deference should be paid to rules deemed appropriate by a board charged with responsibility for balancing the private and communal interests of the unit owners.

[46] More specifically in relation to condominiums, in ***934859 Alberta Inc.***, Chrumka J. of this court held:

> . . . a Court should not lightly interfere in the decision of the democratically elected board of directors, acting within its jurisdiction and substitute its opinion about the propriety of the board of directors decision unless the board's decision is clearly oppressive, unreasonable and contrary to legislation.
> . . .
> Courts do defer to duly elected condominium boards.

[47] As Maverick acknowledges, the notion of reasonableness in circumstances such as these, is essentially one of fact in which all the circumstances have to be taken into account. Although ***Hayes Forest Services Ltd.*** involved a different set of fact circumstances, the British Columbia Supreme Court put the principle this way:

> The determination of the reasonableness of withholding consent is a question of whether a reasonable person would have withheld consent in the circumstances. The determination will be dependent on such facts as the commerical realities of the marketplace, the economic impact of the assignment, . . .

[48] Indeed, using the concept of consensual tribunals, it would be appropriate to apply judicial review principles to a court's assessment of a condo board's withholding of consent. It is within this framework that Maverick relies on ***Ryan***, a decision of the Supreme Court of Canada where the court set out the following definition of unreasonableness:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere. . . This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation, even if this explanation is not one that the reviewing court finds compelling ...
>
> This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.

[49] Since ***Ryan***, the Supreme Court has revised its analysis of judicial review and removed the "patent unresonableness" standard of review: ***Dunsmuir***. However, that change in the approach to the standards of review does not invalidate the ***Ryan*** Court's comments on the application of the unreasonableness standard. On the contrary, it will be seen that the ***Ryan*** language is only slightly reworked in ***Dunsmuir***:

> 46 What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?
>
> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> 48 The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-Southam formalism. In this respect, the concept of deference, so central to judicial review in

> administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. (Emphasis added)

[50] A condo board is not a traditional administrative tribunal; yet, its decisions should be treated with an analogous deference. As between individual owners and the condo board itself, it must be emphasized that a condo board embodies, in addition to the notions of a tribunal, the notions appropriate to an elected body. Therefore, the decisions of a condo board are entitled to respect.

[51] In determining whether this condo board unreasonably withheld its consent to Maverick's development proposal by insisting on the payment of a $5,000.00 damage deposit, I must then begin by looking at the reasons given to Maverick by the board to determine if those reasons can stand up to a reasonably probing examination.

[52] Although Maverick argues that the board did not give it good reasons for withholding consent, it is clear that the board did give Maverick a clear reason for withholding consent: Maverick refused to pay the $5,000.00 damage deposit as required by the Rules.

[53] For the purposes of this application, that is without making a finding that a board could never expand upon original reasons given for withholding consent, I am prepared to assume that the board cannot now add additional reasons, beyond those contained in the Rules themselves, for the $5,000.00 damage deposit. For example, the board cannot argue that Maverick's mere permanent trespass upon unitized property entitles the board to require the payment of a re-development fee.

[54] In determining whether the condo board's denial of Maverick's request until it paid a $5,000.00 fee, the court takes into account that the condo board is elected by the owners, including Maverick, and that the members of the board are volunteers.

[55] Relying only on the Rules relating to damage deposits as being the reason given to Maverick for the imposition of the damage deposit, I have concluded that, even only in relation to the alteration of the roof and not taking into account the other alterations to unitized property, it is not unreasonable to require a damage deposit in relation to penetrations of the roof. The contractor's one year warranty will obviously not be over the life of the roof or the life of the alterations. As to the likelihood of damage to the unitized property as a result of penetration of the roof envelope, a deposit surely attempts to deal with a 100 year rain storm, an exceptional windstorm, an exceptionally heavy snow load. As to the actual occurrence of damage from roof penetrations, there is the evidence of the board's representative who swore that the board had had to repair damage as a result of tampering with unitized property. Finally, the size of the

damage deposit is not disproportionate give the original cost of the unit, $125,000.00 and the cost of the alterations, $100,000.00.

[56] In the latter context, I note as well that, in the circumstances here, the deposit could not be characterized as an impermissible penalty. The distinction between a estimate of damages and a penalty was recently addressed in ***Lapping***. The trespass by Maverick onto unitized property is an action which is potentially actionable on its own. Therefore, the damage deposit requirement in the condo's Rules cannot be considered to be a penalty.

[57] The evidence also establishes that there was nothing unfair in the imposition of the requirement of a damage deposit on Maverick: since the Rules requiring the paying of a damage deposit were imposed, the board has enforced this requirement on all owners who made alterations to which the Rule applied. It was not unfair that the board decided not to go back to try to impose a damage deposit on owners who had made alterations prior to the passage of the by-law: it may have been impossible to impose such a condition retroactively.

[58] In summary, Maverick has not proved that the condo board's withholding of consent to the alterations until Maverick paid a $5,000.00 damage deposit was unreasonable.

6. Previous Q.B. costs

[59] Because the earlier Queen's Bench decision was overturned on appeal, the condo board is entitled to costs of that special chambers application. Belzil J. had ordered that the parties could appear before him if they were not agreed on the quantum of costs. Similarly, if the parties are not agreed on the quantum of costs to which the condo board is entitled with respect to the special chambers hearing before Belzil J., I may be spoken to within 60 days of the release of this decision.

7. Costs of this hearing

[60] If the parties are not agreed on costs, I may be spoken to within 60 days of the release of this decision.

Heard on the 27th day of November, 2009 and the 10th day of March, 2010.
Dated at the City of Edmonton, Alberta this 12th day of March, 2010.

J.B. Veit
J.C.Q.B.A.

Appearances:

Roberto Noce, Q.C., Miller Thomson LLP
for Maverick Equities Inc.

Jerritt R. Pawlyk, Bishop & McKenzie LLP
for The Owners: Condominium Plan No. 942 2336

Appendix A

Roof Penetrations and/or Alterations

The owner shall submit to the board for its approval, detailed and accurate engineered drawings, describing the intended use, type, style, height, and diameter of the proposed roof vent(s) and the location of the proposed roof vent penetration(s), etc. If the board approves of the owners initial submission then the owner shall be required to enter into a written binding agreement with the corporation in accordance with the following terms.

Terms

The owner shall, prior to the commencement of any work:

- engage only a qualified contractor(s) approved by the board;
- provide the board with a copy of the required building permit;
- have his/her contractor provide the condominium corporation with a one-year written warranty
- provide the corporation with a damage deposit in the form of a bond in the amount of $5,000.00 (five thousand) dollars, or such other amount determined by the board.

The corporation shall:

1) be at liberty to use the damage deposit monies to pay for maintenance and repair of the common property or corporation property for as long as the alteration exists. The corporation may use the damage deposit monies to restore the common property or corporation property to its original condition should the owner sell his/her unit without restoring the common property or corporation property to its original condition or fail to restore the common property corporation property to the satisfaction of the board;

2) use any such damage deposit to restore the common property or corporation property to its original condition to the satisfaction of the board by:

   - removing the roof vent(s) and replacing the damaged sheet(s) of metal roofing with a full sheet(s) of new metal roofing material identical to the original one, and
   - remove any original vents (if applicable) that are no longer being used for their intended original plumbing or mechanical operation and replace the damaged sheet(s) of metal roofing with a full sheet(s) of new metal roofing material identical to the original;

3) be entitled to use the damage deposit monies to restore any other common property or corporation property to its original condition as it was before the execution of any work connected with the alteration;

4) return to the owner, damage deposit monies not used by the corporation, within 30 days of the common property or corporation property being restored to its original condition. The corporation is not required to pay interest on damage deposit monies;

5) not be limited from holding the owner responsible for any additional costs required over and above said damage deposit to repair, maintain, or restore the common property or corporation property resulting from the owner's alteration thereto.

Wall Penetrations and/or Alterations

The owner shall submit to the board for its approval, detailed and accurate engineered drawings, describing the intended use, height, width and the location of the proposed penetration or alteration, etc. If the board approves of the owners initial submission then the owner shall be required to enter into a written binding agreement with the corporation in accordance with the following terms.

Terms

The owner shall, prior to the commencement of any work:

- engage only a qualified contractor(s) approved by the board;
- provide the board with a copy of the required building permit;
- have his/her contractor provide the condominium corporation with a one-year written warranty
- provide the corporation with a damage deposit in the form of a bond in the amount of $5,000.00 (five thousand) dollars, or such other amount determined by the board.

The corporation shall:

1) be at liberty to use the damage deposit monies to pay for maintenance and repair of the common property or corporation property for as long as the alteration exists. The corporation may use the damage deposit monies to restore the common property or corporation property to its original condition should the owner sell his/her unit without restoring the common property or corporation property to its original condition or fail to restore the common property or corporation property to the satisfaction of the board;

2) be entitled to use the damage deposit monies to restore any other common property or corporation property to its original condition as it was before the execution of any work connected with the alteration;

3) return to the owner, damage deposit monies not used by the corporation, within 30 days of the common property or corporation property being restored to its original condition. The corporation is not required to pay interest on damage deposit monies;

4) not be limited from holding the owner responsible for any additional costs required over and above said damage deposit to repair, maintain, or restore the common property or corporation property resulting from the owner's alteration thereto.

Electrical, Plumbing and Mechanical Additions, Alterations or Changes over-, under or within Common Property or Corporation Property.

The owner shall submit the board for its approval, detailed and accurate engineered drawings, describing the intended use of any proposed additions, alteration or changes, etc. If the board approves of the owners initial submission then the owner shall be required to enter into a written binding agreement with the corporation in accordance with the following terms.

Terms

The owner shall, prior to the commencement of any work:

- engage only a qualified contractor(s) approved by the board;
- provide the board with a copy of the required building permit;
- have his/her contractor provide the condominium corporation with a one-year written warranty
- provide the corporation with a damage deposit in the form of a bond in the amount of $5,000.00 (five thousand) dollars, or such other amount determined by the board.

The corporation shall:

1) be at liberty to use the damage deposit monies to pay for maintenance and repair of the common property or corporation property for as long as the alteration exists. The corporation may use the damage deposit monies to restore the common property or corporation property to its original condition should the owner sell his/her unit without restoring the common property or corporation property to its original

condition or fail to restore the common property or corporation property to the satisfaction of the board;

2) be entitled to use the damage deposit monies to restore any other common property or corporation property to its original condition as it was before the execution of any work connected with the alteration;

3) return to the owner, damage deposit monies not used by the corporation, within 30 days of the common property or corporation property being restored to its original condition. The corporation is not required to pay interest on damage deposit monies;

4) not be limited from holding the owner responsible for any additional costs required over and above said damage deposit to repair, maintain, or restore the common property or corporation property resulting from the owner's alteration thereto.