Case Name:

Metropolitan Toronto Condominium Corporation No. 1272 v. Beach Development (Phase II) Corp.

RE: Metropolitan Toronto Condominium Corporation No. 1272, Metropolitan Toronto Condominium Corporation No. 1342 and Toronto Standard Condominium Corporation No. 1500, Applicants, and Beach Development (Phase II) Corporation, Beach Development (Phase III) Corporation, Beach Development (Phase IV) Corporation and EMM Financial Corporation, Respondents

[2010] O.J. No. 5025

2010 ONSC 6090

Court File No. 05-CV-289748PD2

Ontario Superior Court of Justice

M.A. Penny J.

Heard: September 20, 2010.
Judgment: November 16, 2010.

(65 paras.)

Counsel:

Michael A. Spears, Counsel for the Applicants.

Richard Macklin, Counsel for the Respondents.

ENDORSEMENT

M.A. PENNY J.:--

The Application

1 This is an application under section 135 of the Condominium Act, 1998, S.O. 1998,c. 19, for:

(1) a declaration that the respondents, by failing to establish a reciprocal operating agreement (or "cost sharing agreement") between the applicants and EMM Financial Corporation,

have acted oppressively or in a manner which is unfairly prejudicial to the applicants or unfairly disregards the interests of the applicants[1]; and,

(2) an order requiring the respondent EMM to pay the applicants its share of the costs of maintenance, repair, replacement and operation of certain shared facilities and services in the proportions set out in the engineering reports of Halsall Associates Limited filed in these proceedings.

2 During oral argument, counsel for the applicants advised me that the applicants were not seeking an order for any specific amounts. If the applicants were successful in obtaining the declaratory relief sought, I was asked to direct a reference on the question of the allocation and amounts of any payments that should be made.

The Parties

3 EMM was the developer of four condominium projects at the old Greenwood Raceway site on Queen Street East. At some point, a block of land was conveyed by EMM to each of the Beach respondents. On this land, each Beach respondent developed a multi-storey condominium. The ground floor of each development remained freehold property for the development of retail and commercial premises. This freehold property was, therefore, never part of the condominium property. In each case, the freehold ground floor commercial/retail portion was conveyed back to EMM. EMM now leases these freehold premises to various commercial and retail enterprises. Three of the four original projects are in issue in this application.

4 Metropolitan Toronto Condominium Corporation No. 1272 (MTCC 1272) is a 48 unit residential condominium building at 1797 Queen Street East. It came into existence on November 9, 1999 by registration of a declaration by Beach Development (Phase II) Corporation.

5 Metropolitan Toronto Condominium Corporation No. 1342 (MTCC 1342) is a 48 unit residential condominium building at 1765 Queen Street East. It came into existence on October 19, 2000 by registration of a declaration by Beach Development (Phase III) Corporation.

6 Toronto Standard Condominium Corporation No. 1500 (TSCC 1500) is a 104 unit residential condominium building at 1733 Queen Street East. It came into existence on February 24, 2003 by registration of a declaration by Beach Development (Phase (V) Corporation.

7 Beach II, Beach III and Beach IV (the declarants) were all incorporated on September 9, 1997. They share the same registered office address. The declarants and EMM have the same directors and officers.

The Legal Context

8 Section 135 of the Act provides that if the conduct of an owner, a corporation, a declarant or a mortgagee of a condominium unit is or threatens to be oppressive or unfairly prejudicial to the applicant, or unfairly disregards the interests of the applicant, the court may make an order to rectify the matter. The court make any order it deems proper including an order of prohibition and an order requiring the payment of compensation.

9 "Owner" is defined as the owner of a unit in the condominium. "Corporation" means a condominium corporation under the Act. A "declarant" is defined as a person who owns the freehold or leasehold estate in land and who registers a declaration and description with respect to that land under the Act. The Beach respondents are declarants. It is common ground, however, that EMM is not an "owner," a "corporation" or a "declarant."

10 In McKinstry v. York Condominium Corporation No. 472 (2003), 68 O.R. (3d) 557 (S.C.J.) at para. 33, Jurianz, J. held that section 135 of the Act has "much in common" with the corporate oppression remedy. He went on to find that the oppression remedy under section 135 of the Act should not be unduly restricted but given a broad and flexible interpretation that will give effect to the remedy it created. Stakeholders, he said, may apply to protect their legitimate expectations from conduct that is unlawful or without authority, and even from conduct that may be technically authorized and ostensibly legal. The only prerequisite to the court's jurisdiction to fashion a remedy is that the conduct must be or threaten to be oppressive or unfairly prejudicial to the applicant or unfairly disregard interests of the applicant.

11 Later in the same passage, however, Juriatiz J. cautioned that the oppression remedy protects only "legitimate" or "reasonable" expectations and not individual wish lists (this observation arose in a decision of Farley J. in 820099 Ontario Inc. v. Harrold Ballard Ltd. (1991), 3 B.L.R. (2d) 113 at p. 123). The court must balance the objectively reasonable

expectations of the owner with the condominium board's ability to exercise judgment and secure the safety, security and welfare of all owners and the condominium corporation.

12 The Supreme Court of Canada has observed that the oppression remedy is a broad and flexible one, allowing any type of corporate activity to be the subject of judicial scrutiny. Nevertheless, the legislative intent of the oppression remedy is to balance the interests of those claiming rights from the corporation against the ability of management to conduct business in an efficient manner: see Kelvin Energy v. Lee, [1992] 3 S.C.R. 235 at p. 256.

13 In BCE Inc. v. 1976 Debentureholders, 2008 SCC 69, [2008] 3 S.C.R. 560, the Supreme Court held that the best approach to analyzing the oppression remedy is a two-pronged test. At the first stage, the applicants must establish a breach of reasonable expectations. If successful, the court must go on to consider whether the conduct complained of amounts to oppression, unfair prejudice or unfair disregard.

The Issues

14 In this context, two issues arise on this application:

1. is any remedy under section 135 of the Act available against EMM; and
2. does the Beach respondents' failure to cause the applicants to enter into a cost sharing agreement with EMM constitute oppression under section 135 of the Act?

1. The Status of EMM

15 Section 135 provides for a remedy against a condominium corporation, an owner or a declarant. It is conceded that EMM does not fit within any of these three categories. The applicants argue, however, that it would defeat the purpose of the Act if a declarant could transfer property to a related corporation and, thereby, somehow avoid its obligations under the Act.

16 As to this latter point, while EMM may not fall within the class of entities against which the oppression remedy is available, the Beach respondents, as declarants, clearly do. If the declarants were found to have engaged in oppressive conduct, remedies would be available against them.

17 In my view, no remedy is available directly against EMM under section 135 in this case. Although reference was made to the relationship between the declarants and EMM, there was limited evidence about the nature of that relationship. Whether one controlled the other, for example, was not introduced in evidence. In any event, the applicants did not argue that I should pierce the corporate veil.

18 In coming to the foregoing conclusion, I wish to make it clear that I am not making a finding that EMM could not be found liable to the applicant condominium corporations under unjust enrichment or some other restitutionary or common law principle. I am merely finding that the statutory remedy under section 135 does not apply to EMM because EMM does not fall within the category of entities against which that statutory remedy is available.

2. The Oppression Remedy

(a) Was There A Breach of Reasonable Expectations?

19 The concept of reasonable expectations is objective and contextual, taking into account the facts of the specific case, the relationships at issue and the entire context. The actual expectation of a particular stakeholder is not conclusive. The applicant must identify the expectations that were allegedly violated and establish that those expectations were reasonably held, based on factors that may include general commercial practice, the nature of the corporation, the relationship between the parties, steps that the claimant could have taken to protect itself, the fair resolution of stakeholders' conflicting interests and, importantly, representations and agreements. I address each of these factors below.

(1) Agreements and Representations

20 I shall deal with this factor first because, although not necessarily dispositive of the parties' reasonable expectations, it is clearly very important.

21 One of the leading decisions of the Ontario Court of Appeal on the issue of oppression in the condominium context is York Region Vacant Land Condominium Corp. No. 968 v. Schickedanz Bros. Ltd. (2006), 215 0.A.C. 158. This

case involved a bifurcated common element allocation formula which, the Court of Appeal found, clearly favoured the interests of the developer at the expense of the unit holders. There was no allegation that the bifurcated common expense formula had been misrepresented in the developer's declaration or that there was any disclosure impropriety prior to the owners' purchases. Indeed, the Court of Appeal found that the bifurcated expense formula outlined in the declaration was disclosed to all prospective purchasers of units. The Court of Appeal also found that there had been no improper intent behind the bifurcated common expense formula. In fact, the formula was an attempt to reflect the commercial realities inherent in that particular site and the staged nature of the development. Last, the Court of Appeal concluded that so long as the bifurcated formula was precisely drafted, properly disclosed to prospective purchasers and infringed no prohibition in the Act, then the allocation formula could not be said to defeat owners' reasonable expectations or to give rise to oppressive conduct. If the Court of Appeal held, declarants could not rely upon the terms of a declaration which fully complied with the Act and was fully disclosed to purchasers, there would be "shocking implications" for the industry.

22 The Schickedanz case is, therefore, premised on the understanding that the framework of the Act is predicated on the registration of the declaration, which then becomes, along with the Act, the core document upon which owners and prospective owners can rely.

23 In this application the only evidence tendered by either party was through their respective solicitors, both lawyers with experience in condominium matters. There was no evidence presented by unit owners, or by the officers or board members of the condominium corporations or by any directors, officers or employees of the respondents. There was, therefore, no admissible evidence of actual expectations on the part of either party and no evidence of representations made by either party, except as disclosed in the condominium documents. This case was argued by both parties on the assumption that the parties' reasonable expectations were to be determined from these documents, in particular, the declarations and disclosure statements together with, in the case of TSCC 1500, a bylaw and limited cost sharing agreement.

24 Each of the disclosure statements in this case contemplated the existence of the commercial/retail area and the likelihood of shared servicing systems between the condominium property and the freehold property. The disclosure documents provided that:

> The commercial/retail area to be constructed by the Declarant as an integral part of the structure comprising the Building, which may be sold by the Declarant or which may be retained and leased, may share the servicing systems of the Building but shall be separately metered for and shall bear the cost of its utility usage. The commercial/retail area which may be divided into two or more sub-areas, shall also include parking spaces on the grade level adjacent thereto. In addition to the sharing of servicing systems, the commercial/retail area in the Building may be subject to various rights and easements providing for, inter alia, support, maintenance, repair, reconstruction, etc. The commercial/retail area may, at the Declarant's sole option, be condominiumized or may be retained as freehold.

25 Each of the declarations addresses common elements and common expenses. However, as discussed in more detail below, in my view these references relate solely to the condominium property and the obligations of the condominium owners inter se and have no relevance or application to the freehold commercial/retail property on the ground floor. In the case of MTCC 1272 and MTCC 1342, the declarations are silent on the question of shared services with the freehold owner. The description of the condominium property, in each declaration, does, however, describe in detail all the easements retained by the developer in connection with the ground floor freehold property.

26 In the case of TSCC 1500, Beach IV registered a declaration which specifically contemplated an "Easement and Cost Sharing Agreement" to provide for sharing the costs of maintaining shared services and easements with the freehold owner. Beach IV, as declarant, also caused TSCC 1500 to enact a bylaw providing for a cost sharing agreement and caused TSCC 1500 to enter into just such an agreement.

27 The recitals of the TSCC 1500 cost sharing agreement refer to "provisions pertaining to the payment of all maintenance, operating and improvement costs related or pertaining to the Specific Servicing Easements and the Shared Servicing Systems" and to confirming "the monitoring and responsibility to pay for water consumption." Shared Servicing Systems is defined as the systems "servicing the condominium lands and the commercial development including, without restricting the generality of the foregoing, the mechanical systems, safety systems, underground storm and sanitary sewer pipes, water pipes and lines and electrical conduits and systems, cable and telephone wires and lines and gas lines

and any other private or public utility or service." The only specific provision for cost sharing in the agreement, however, is in respect of water meter monitoring and the responsibility to pay for water consumption.

28 Article 3.01 of this agreement provides that each of the condominium corporation and the freehold owner "shall only be responsible to pay for the total cost of servicing, repairing, and maintaining, installing, replacing, altering and/or inspecting that portion(s) of the Shared Servicing Systems and the Specific Servicing Easements which is situated on its respective Property."

29 The declarants argue that the declarations for MTCC 1272 and 1342 deal comprehensively with "common expenses" and provide that the unit holders are responsible for 100% of the common expenses. They argue, therefore, that neither the applicants nor their unit owners could have any reasonable expectation that the cost of shared services with the freehold retail premises would be "shared" with the freehold landowner.

30 There are at least two reasons for rejecting this argument. First, the provisions relied on by the declarants deal with the common elements of the condominium corporation. They do not deal with shared elements between a condominium corporation and a freehold owner (in the TSCC 1500 case, the shared service elements are dealt with separately). Accordingly, in my view, the "common elements" provisions of the declarations are simply irrelevant to the question of the reasonable expectations of the condominium corporations regarding the cost of shared services with the freehold owner.

31 Second, the logic of the declarants' argument on this issue would suggest that no respondent has any liability for any cost of shared services whatsoever. However, the respondents, in particular EMM, did not deny in this application that they could be responsible for their appropriate share of the cost of maintaining shared services. Indeed, "with prejudice" positions taken in failed negotiations seeking to establish a cost sharing agreement for shared services formed part of the record on this application. Significantly, EMM took the position that it did not oppose cost sharing for shared services "in principle." Rather, where negotiations broke down was over the specific costs (both type and amount) that would be subject to sharing and how those costs would be allocated between the condominium corporations and the freehold owner.

32 This does not end the matter, however. The fact remains that there are no documents in connection with MTCC 1272 and MTCC 1342 dealing with cost sharing for shared services at all and that, with respect to TSCC 1500, the documents provide for specific cost sharing only with respect to water consumption and otherwise provide that each party is responsible for the cost of shared services "situated on its respective Property."

33 It must be remembered that while the Act defines and deals comprehensively with the common elements and common expenses of the condominium corporation, there is almost nothing about shared services. While there are statutory provisions dealing with particular situations where there is a cost sharing agreement (for example, sections 113 and 134), nothing in the Act requires a cost sharing agreement in the context of shared services with non-condominium owners.

34 The applicants argue that disclosure of the existence of shared services in the disclosure statement gives rise to a reasonable expectation that there would be an agreement on how the costs associated with maintaining those shared services would be shared. I cannot agree.

35 As the Supreme Court said in BCE (para. 70), it may readily be inferred that a stakeholder has a reasonable expectation of fair treatment. However, oppression turns on particular expectations arising in particular situations. The question is whether the claimant stakeholder reasonably held a particular expectation -- in this case, whether the reasonable expectations of the applicants could, in the face of the documents that were exchanged, extend to the existence of detailed, comprehensive cost sharing agreements between the applicants and EMM, or, in the case of TSCC, a further detailed, comprehensive cost sharing agreement.

36 The Act does not require, and the documents do not contemplate, any further agreements on this issue. As will be discussed in more detail below, the applicants are not without remedies at common law. Accordingly, the agreements and documents exchanged between the parties do not, in my view, support a reasonable expectation of any comprehensive cost sharing agreement on the issue of shared services beyond what was disclosed in the documents.

(ii) General Commercial Practice

37 The affidavit evidence of the applicants' solicitor was to the effect that a cost sharing agreement is invariably entered into where there are shared services of the kind involved here.

38 However, this evidence was contradicted by the evidence of the respondents' solicitor who said that there are a variety of ways to deal with the sharing of costs for shared services, only one of which involves a comprehensive cost sharing agreement. The respondents' solicitor's evidence suggests that a cost sharing agreement is not "invariable" where there are shared services.

39 Affidavits front lawyers retained in a litigious dispute sometimes have to be filed. It is not, however, a desirable means of putting evidence before the court, especially where: a) the evidence is controversial; and, b) the evidence addresses an issue going to the merits of the dispute (as opposed to an issue of procedure or process). In my view, the filing of affidavits from a party's own solicitor is not an appropriate means of proving "general commercial practice," at least when the issue is controversial.

40 In this case, I am unable to find on the evidence that cost sharing agreements are invariably adopted by condominium corporations in these circumstances. The evidence of both sides was, it seems to me, overreaching and lacked objectivity. While it may happen often, and while it may well be desirable (to avoid the very kind of dispute which has arisen here), I cannot find on the evidence presented in this case that there is a general commercial practice of adopting comprehensive cost sharing agreements to deal with the cost of shared services in mixed use condominium developments. Accordingly, this factor does not support a finding that a comprehensive cost sharing agreement was a reasonable expectation of the applicants.

(iii) The Nature of the Corporation

41 The applicants argue that the Act is "consumer protection" legislation intended for the protection of unit holders and the condominium corporations of which they are members. They argue that these consumer protection purposes require the implication of a cost sharing agreement in these circumstances. However, Finlayson J.A., in Peel Condominium Corporation No. 505 v. Cam-Valley Homes Ltd. (2001), 53 O.R. (3d) 1, held, in overturning the judgment at trial, that the trial judge's emphasis on the Act as having "consumer protection objectives" did not reflect the balance that the Court of Appeal had previously said exists between that goal and the commercial realities of the condominium industry. Finlayson J.A. cited Robins LA. in Abdool v. Somerset Place Developments of Georgetown Ltd (1992), 10 O.R. (3d) 120 (C.A.) (which held that the proper interpretation of the Act requires a balance between consumer protection and the commercial realities of the condominium industry as a whole). "The objective of consumer protection," Finlayson J.A. wrote (at para. 35), "is attained by the requirement of full disclosure under s. 52 of the Condominium Act and must be seen in the context of the full disclosure package."

42 In my view, reading in a requirement for a comprehensive cost sharing agreement in this case would be tantamount to judicial legislating. If a cost sharing agreement must be put in place whenever there are mixed-use developments involving shared services, the Act would have so provided. This factor too does not support the reasonableness of the applicants' expectation.

(iv) The Relationship of the Parties

43 The applicants argued that the declarants engaged in a form of self-dealing when they failed to put in place a cost sharing agreement. They argue that unfairness is manifest in the absence of a cost sharing agreement because EMM "benefits" from sharing services with the condominiums "yet has no responsibility to contribute towards the operating and maintenance costs" for those services.

44 I cannot agree. The respondents concede that EMM may be responsible at common law for some portion of certain costs arising from services which are truly shared. The disagreement is over the scope, amount and allocation of those costs.

45 The respondents say there is no particular need for a cost sharing agreement since the common law of negligence and nuisance applies. In addition, in my view, the law of restitution and unjust enrichment would be highly relevant, were the owner of the freehold property, for example, to make no contribution to the cost of shared services but purport to take all the benefits without any of the burdens.

46 While I can acknowledge that a cost sharing agreement might have been a prudent, and even preferred, way to achieve a fair allocation, the applicants are not without their remedies at common law in the absence of such an agreement. The imputation of an agreement is not necessary to protect their legitimate interests.

47 The applicants also argued that the declarants were fiduciaries and owed fiduciary duties to prospective unit holders and to their respective condominium corporations. They rely on the reasons of Wilson J.A. in York Condominium

Corporation No. 167 v. Newrey Holdings Ltd (1981), 32 O.R. (24) 458 at p. 467. However, Wilson J.A.'s conclusion on this issue was soundly rejected by the Court of Appeal's later decision in Peel, supra.

48 In Peel, Finlayson J.A. wrote (at para. 34) that, "to the extent that Wilson J.A.'s statement can be read along with her earlier statements in Newrey to hold that the developer is in a fiduciary relationship with prospective unit holders, this position is unsupported by the general law and is contradicted by recent decisions." Later in his judgment, Finlayson J.A. added (at para. 40), "this notion that the developer has an obligation to incorporate all the purchasers' "reasonable expectations" into the disclosure documents is unrealistic and unsupported by authority."

49 Finlayson J.A. went on to say, in para. 43, that:

> The developer does not hold the condominium property in trust for the purchaser of the unit, it holds the title to the unit in trust for the prospective purchaser who has executed an agreement of purchase and sale to purchase a unit. The developer's good faith obligation, or duty, is to carry out the terms of the agreement and deliver whatever title the contract between the parties calls for ... there is no overarching fiduciary duty arising out of the relationship of a vendor and purchaser as such. The suggestion by the trial judge that a prospective purchaser is entitled to repose some element of trust in the developer that it will deal with the purchaser's reasonable expectations in the disclosure documents introduces an element of paternalism that is totally unjustified in such a relationship ... It is inappropriate to refer to the unit holder as a fiduciary in any circumstance. The prospective purchaser is protected by the statutory requirement of full disclosure, not the extension of fiduciary principles to the bargaining process.

50 In view of the Court of Appeal's decision in Peel, and in the absence of any clear evidence going beyond the respondents' status as declarants to establish a fiduciary relationship, I cannot conclude that the declarants, qua declarants, owed any fiduciary duty to the applicants.

51 Accordingly, I do not think the relationship of the parties was such as to support the conclusion that it was reasonable to expect there was, or would be, a comprehensive cost sharing agreement to deal with services shared between the condominium corporations and the freehold owner.

(v) Steps the Applicants Could Have Taken To Protect Themselves

52 The condominium corporations were, of course, set up and operated by the declarants until the units were sold and the first condominium corporation boards were appointed. Thus, while the applicants were not in a position to "protect" themselves at the outset, this situation changed during the process of purchasing and selling units and turning the corporations over to the new owners.

53 A good deal of argument was devoted to when units were purchased and when rights to rescind (both unqualified and on the basis of material representations, etc.) were triggered. There was, unfortunately, only limited evidence on this issue which makes it extremely difficult to come to any precise conclusions on whether, and when, unit holders had a right to walk away from their purchases.

54 It is clear, however, that several purchasers who became members of the board of the applicants were represented by lawyers when they purchased their units. In all cases, ownership in these units was not transferred until after all relevant disclosure was made.

55 The existence of the retail/commercial space and of shared services with that space was clearly disclosed, as was the existence of mutual easements with respect to those shared systems and interests. In the case of MTCC 1272 and MTCC 1342, the board members were also aware that there were no cost sharing agreements (as none were mentioned or disclosed). In the case of TSCC 1500, the limited nature of the cost sharing agreement that was implemented was also disclosed prior to closing. If these board members were concerned about the lack of comprehensive cost sharing agreements, they could have raised those issues as purchasers prior to closing the purchase of their units.

56 Although this factor is of limited significance on the facts of this case, it tends to weigh against the imputation of a reasonable expectation that there would be comprehensive cost sharing agreements between EMM and each condominium corporation.

(vi) Fair Resolution of Existing Conflicts

57 Another factor identified by the Supreme Court in BCE as potentially relevant to the parties' reasonable expectations is the manner in which conflicts between the competing interests of the parties have been resolved. There is no rule that one set of interests necessarily prevails over another. The question, ultimately, is whether the existing board of the corporation exercised its business judgment in a responsible way.

58 There was evidence before me that the developer in each of these projects specifically sought to avoid being embroiled in protracted board or committee meetings and in negotiations conducted through expensive property managers about the amount and allocation of shared services costs. Instead, the developer allegedly sought to establish a situation under which the owner of the freehold property (EMM) would look after its property, the condominium corporations would look after their properties, and each would deal with the other from time to time as necessary to resolve matters of common interest. Counsel for the respondents analogized this situation to owners of semi-detached or town houses. There may be no "agreement" between them to share common costs but, in the event there are costs arising from shared property or services, the common law would provide a remedy for a fair allocation.

59 The respondents concede in this case that EMM may be responsible for some portion of the cost of shared services actually incurred. It was the business judgment of the declarants that they would leave that issue to be resolved at common law. Clearly, the applicants are not without common law remedies. In the circumstances, I cannot conclude it was irresponsible of the declarants to leave issues of cost sharing to be determined, as they arose, under general common law principles.

60 In summary, having regard to the factors set out by the Supreme Court in BCE, I find that the applicants have not established that the specific expectation they now allege -- that there would be a comprehensive cost sharing agreement to deal with the cost of all shared services with the freehold owner -- was reasonably held.

(b) Was There Oppressive Conduct?

61 Once breach of reasonable expectations is shown, the applicant must also show that the respondent's conduct falls within the category of "oppression." There is no exhaustive definition of oppression. The case law reflects the search for certain "badges" or "indicia" of oppressive conduct. Identified factors include: the lack of a valid corporate purpose for the transaction; failure on the part of the corporation or its controlling shareholders to take reasonable steps to simulate an arm's length transaction; lack of good faith on the part of the directors; discrimination between shareholders with the effect of benefiting the majority to the exclusion or detriment of the minority; and, lack of adequate and appropriate disclosure of material information.

62 However, having found that the alleged expectation of a comprehensive cost sharing agreement was not reasonable in the circumstances of this case, it is not necessary for me to consider the second branch of the test established by the Supreme Court of Canada in BCE.

Conclusion

63 In conclusion, the precondition to court intervention under section 135 of the Act has not been established. While it may have been prudent, or even desirable, to have implemented a comprehensive cost sharing agreement at the outset, I cannot find that the declarants' failure to do so was "oppressive" in the relevant legal sense.

64 The applicants are, however, not without a remedy at common law since EMM, in the absence of clear contractual provisions to the contrary (of which there are none) would, in my view, be responsible to pay some share of the costs of shared services in any event. The scope, amount and allocation of those costs, however, in the context of common law remedies such as restitution etc., (or, for that matter, Article 3.01 of the TSCC 1500 agreement) is not before me in this application. Faced with the clarification provided in this endorsement, it is to be hoped that the parties will act rationally and avoid the cost and distraction of further legal proceedings by returning to their negotiations and concluding a cost sharing agreement which resolves the respective obligations of the parties with respect to all shared services sensibly and fairly.

Costs

65 Counsel agreed at the close of oral argument that costs should follow the event and that, in the case of either successful party, costs should be fixed on a partial indemnity basis at $20,000. Accordingly, I award costs to the respondents fixed in the amount of $20,000 inclusive of fees, disbursements and all applicable taxes.

M.A. PENNY J.

cp/s/qlrxg/qljzg/qljxr

1 In this endorsement I shall use the terms "oppression" and "oppressive" to include all three components of the oppression remedy unless the context requites otherwise.