CITATION: Middlesex Condominium Corporation 229 v. WMJO Limited, 2015 ONSC 3879
COURT FILE NO.: CV-10-1864
DATE: 2015/07/17

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
Middlesex Condominium Corporation 229	M. Paul Morrissey, for the Plaintiff
Plaintiff	
- and -	
WMJO Limited, Ayerswood Development Corporation, Middlesex Condominium Corporation 282, Middlesex Condominium Corporation 492 and Middlesex Condominium Corporation 500	F. Scott Turton, for the Defendants
Defendants	
	HEARD: February 11, 12 and 13, 2015

LEITCH J.

REASONS FOR JUDGMENT

[1] The plaintiff is a condominium corporation created under the *Condominium Act*, 1998, S.O. 1998.

[2] In this simplified trial, the plaintiff seeks a finding that the defendants are liable to contribute to the operating and maintenance costs of a private sewage system. The plaintiff contracts with a plumbing company for the required regular maintenance and cleaning of the pumps and tanks. Sludge must be removed from the tanks every three months. It arranges for repairs, pays the insurance, electrical and alarm system bills, and posts the performance bond required under the Ministry of the Environment certificate of approval. It invoices the owners of townhouse complexes whose units have been connected to sewage systems for their proportionate share of the expenses.

[3] In its third amended statement of claim, the plaintiff seeks a declaration that one or more of the defendants are jointly or severally obligated to contribute, on a *pro rata* basis, to the costs of maintaining and operating the jointly used sewer system. In the alternative, the plaintiff seeks an order requiring the defendants to pay to the plaintiff the equivalent of 26.92% of the plaintiff's expenses to operate the jointly used sewage facilities from 2008 until the disposition of this action.

[4] Originally, the plaintiff based its claim on a joint use and maintenance agreement, which binds the successors and assigns of the parties to the agreement, as described below.

[5] However, in *Amberwood Investments Ltd. v. Durham Condominium Corporation No. 123*, [2002] O.J. No. 1023 (C.A.), 58 O.R. (3d) 481, the Ontario Court of Appeal, at para. 33, held that positive covenants do not run with freehold land, either at law or in equity. Therefore, in that case the defendant was not bound by a positive covenant to pay interim expenses under an agreement solely by virtue of having acquired the lands with notice of the terms of the agreement.

[6] As a result, the plaintiff at this trial pursues its alternative relief and seeks a remedy against the defendants on the basis of unjust enrichment and in the alternative, on the basis that there was, and is, an expressed or implied agreement between the plaintiff and one or more of the defendants to the effect that parties jointly using facilities will share the costs of maintaining and operating such facilities on a proportionate basis.

[7] The plaintiff noted in paras. 70 - 73 of its factum that:

70. The defendant takes the position that the plaintiff's remedy is limited to a percentage of the hydro bills, because the plaintiff would bear all of the other costs in any event. This does not take into account a number of factors including the following:

a) increased costs from having to maintain a system designed for 156 rather than 42 units;

b) a corresponding increase in wear and tear on the works;

c) increased amount of sludge that must be removed from the holding tanks every three months;

d) increased risk of foreign objects being flushed into the system, resulting in system breakdowns, emergency calls and unscheduled repairs;

e) increased amount of sewage that would have to be hauled away from the site in the event of system failure.

71. Nor does the defendant's position take into account the substantial value to the defendant in:

a) not having to incur the expense of firstly constructing and then operating a private sewage system;

b) not being exposed to environmental and regulatory liabilities as the system operator;

c) not having to deal with day to day management of the system, including contracting, supervising, decision-making, arranging insurance and bonding and ensuring that applicable regulatory requirements are being met;

d) not having to deal with system emergencies.

72. Whether viewed as a common venture in respect of which it is unjust to not require one of the joint partners receiving a benefit to not contribute, or a service which is being accepted with knowledge that payment is expected, it is submitted that the best measure for determining the remedy for unjust enrichment is the actual amount the plaintiff must pay to third parties to maintain and operate the system, which can be fairly taken as evidence as to the market price for such services, and then apportion that expense among the users on a *pro rata* basis.

> 73. As this is a bifurcated proceeding, any issues with respect to the reasonableness of the sums being expended to maintain the system can be challenged at the second part of this trial at which time the issue of the quantum payable shall be determined.

[8] The defendants ask that the court declare that the defendants are not jointly or severally obligated to contribute, on a *pro rata* basis to costs arising under the joint use and maintenance agreement or to contribute, on a *pro rata* basis to the costs of maintaining and operating the jointly used sewer systems. The defendants ask that the action otherwise be dismissed with costs and they seek costs against the plaintiff and each unit owner in accordance with that unit's proportionate share specified in the declaration.

Procedural History

[9] This action originally began with three proceedings in the Small Claims Court. These three small claims court claims were defended and consolidated under Rule 76 into this action.

[10] On June 26, 2013, the plaintiff moved for summary judgment before Gorman J. seeking a finding that the defendants were liable under the joint use and maintenance agreement earlier referred to or liable in equity to pay a proportionate share of the costs of the sewage pumping facility. The motion was dismissed.

[11] The order of Gorman J. was appealed to the Court of Appeal. The Court of Appeal quashed the appeal on March 3, 2014, finding that Gorman J. had not made a final order.

[12] At a pre-trial conference before Leach J. on October 9, 2014, the parties agreed to bifurcate the issues of liability and damages. The parties agreed to have the issue of liability determined at this summary trial.

Background Facts

[13] In order to build a 156 townhouse development on Hamilton Road in London, Ontario the original developer, Trenlon Developments Limited ("Trenlon") was required by the City of London (the "City"), pursuant to s. 41 of the *Planning Act*, R.S.O. 1990, c. P.13, to construct a private sewage system to carry waste uphill from the townhouse development to the municipal sewage lines.

[14] Trenlon entered into a development agreement with the City.

[15] Mr. Graat signed the development agreement on behalf of Trenlon and the agreement was registered against the title to the property on August 31, 1989.

[16] The development agreement required Trenlon to construct and maintain a sanitary sewer pumping station with the capacity to service 156 townhouse units.

[17] As it developed each phase of the property, Trenlon was required, as set out in para. 9 of the development agreement, to enter into an agreement with the owners of other phases to provide for the joint use and maintenance of the common internal driveway and services.

[18] Sub-paragraph 13(h) of the development agreement required as follows:

> The Owner [Trenlon] hereby agrees to design, construct, maintain and operate a sanitary pumping station in accordance with City of London and Ministry of the Environment guidelines and specifications, to serve this development. The Owner further agrees to incorporate a high water alarm or other alarm in the pumping station that will signal a system failure of every nature or kind including electrical and mechanical failure. Such a design shall be approved by both the City of London and the Ministry of the Environment as part of the specification approval process. The parties hereto agree that the pumping station will not be assumed by the City of London as part of the City's sewage system and the Owner shall remain liable for the maintenance thereof, all in accordance with the information specifications and documents filed and approved by the City of London and the Ministry of the Environment. Notwithstanding any other term of this agreement the parties hereto agree that this covenant shall be binding on the transferee, its heirs, administrators, successors and assigns and upon the Owners from time to time of the lands herein conveyed and shall run with the land, the subject of this agreement and be binding thereon.

[19] Paragraph 27 of the development agreement provided that its terms and conditions would run with the land and be binding upon all successors and assigns as subsequent owners and occupiers of the lands from time to time.

[20] In September 1989, Trenlon sold the property to Award Developments (Ontario) Limited ("Award"), retaining a small parcel which was later conveyed to the City to widen Hamilton Road.

[21] Award transferred a portion of the property to a related company, Double G Contractors Limited ("Double G"), in March, 1990.

[22] The sewage system was approved under the *Ontario Water Resources Act*, R.S.O. 1990, c. O.40 on September 26, 1990, and a licence was issued to Double G permitting 156 townhouse units to connect to the sewage system.

[23] On December 13, 1990, Double G and Award entered into a joint use and maintenance agreement which provided for a sharing of certain joint facilities. The other parties to this joint use and maintenance agreement were Central Guaranty Trust Company and Junsen Limited in Trust ("Junsen") which held mortgages on the lands.

[24] The recitals to the agreement indicated that it was contemplated that Double G would create a condominium corporation on part of the property and that three further separate condominium corporations would be created in three further phases on the remainder of the land owned by Award.

[25] The final recital to the agreement stated the desirability of having a joint use and maintenance agreement "for the regulation of future repair, maintenance, and/or replacement of the joint facilities and to provide for payment in respect thereof."

[26] Paragraph 1 of the agreement itself stated that Double G and Award would use, enjoy and maintain the joint facilities, which were described in the agreement as the pumping station, the internal road system and certain utilities and services.

[27] Paragraph 7 provided that each phase of the four phase project would "assume and be responsible for a proportionate share of the costs and expenses of maintenance, repairs and/or replacement of the joint facilities."

[28] Double G and Award agreed that the terms of the agreement would not be altered without the consent of Central Guaranty or Junsen during the time that those entities held mortgages on any part of the properties.

[29] Central Guaranty and Junsen executed the agreement to confirm their knowledge of it and they postponed their mortgage interests to the joint maintenance agreement. Mr. Graat signed the agreement on behalf of Junsen.

[30] Between 1989 and 1991 Double G developed its property into a 43 unit townhouse complex. This project was registered as Middlesex Condominium Corporation 229 (the current plaintiff) on June 5, 1991. Each of the 43 townhouse units have been sold to individual owners and these individual unit owners now own a proportionate share of the common elements including the sewage pumping station as tenants in common with all other unit owners.

[31] In 1991, the property owned by Award was transferred to 683024 Ontario Limited ("683024"), a company in which Mr. Graat is an officer and director. As Mr. Graat testified, Award defaulted on its mortgage to Junsen, Junsen stepped in and his company 683024 became the owner of the property.

[32] In 1993, 683024, transferred part of these lands to WMJO Limited ("WMJO"), another company in which Mr. Graat is a director and officer. WMJO continues to own these lands after developing them in phases between 1993 and 2003 into three condominium corporations: Middlesex Condominium Corporation 282 registered October 21, 1993; Middlesex Condominium Corporation 492 registered December 27, 2001, and Middlesex Condominium Corporation 500 registered April 5, 2002 (the "defendant condominium corporations").

[33] Each of the defendant condominium corporations has 14 townhouse units which are rented by the owner, WMJO. WMJO first retained Key Property Management Limited ("Key Property") as its property manager, then Cornerstone Properties Inc. ("Cornerstone") and then more recently Ayerswood Development Corporation ("Ayerswood"). Mr. Graat is a director and officer of Key Property, Cornerstone and Ayerswood.

[34] Each of the 42 units owned by WMJO is connected to the private sanitary sewer system owned by the unit owners in the plaintiff's project.

[35] In 1993, 683024 transferred the balance of the property to a third party. This portion of the property was developed into a 71 unit housing co-operative known as Oaklands Housing Co-Operative ("Oaklands").

[36] Therefore, there are five townhouse style complexes consisting of 156 residential units on the property that was originally the subject of the development agreement between Trenlon and the City (the 43 units which are part of the plaintiff's condominium complex, the 42 units which are part of the three defendant condominium complexes and the 71 units in Oaklands) which all share certain

amenities and infrastructure, in particular, the use of common entrances from Hamilton Road, the internal roadways, a common storm water sewage system and a common sanitary sewage system. These complexes also share the same municipal addresses.

The Documentary Evidence Presented at the Summary Trial

[37] At this hearing to deal with the issue of liability, the plaintiff filed, on consent, a two-volume exhibit brief, which included an agreed statement of facts (Exhibit 1).

[38] In addition, the parties filed a plaintiff's brief of miscellaneous documentation (Exhibit 2); an affidavit from Mr. Leonard Reich, who was the plaintiff's lawyer from 1993 until the late 90s, to which was attached 76 exhibits (Exhibit 3); the plaintiff's financial statements for the 1992 to 2009 fiscal years (Exhibit 4); a brief of the minutes of the plaintiff's Board of Directors from 1995 to September 2003 (Exhibit 5); the defendants' affidavits for trial (Exhibit 6) which included the affidavit of Susan Turton, outlining the history of ownership of the property, and an affidavit of Mr. John Camara, a construction manager for Ayerswood, affirmed June 17, 2013, an affidavit of Mr. Graat affirmed June 17, 2013, and a supplemental affidavit of Mr. Camara affirmed January 22, 2015; a second volume of defendants' affidavits (Exhibit 7), which included a second affidavit of Mr. Graat affirmed February 11, 2015 and a third affidavit of Mr. Camara affirmed February 11, 2015; and, a two-volume brief of exhibits referenced by Ms. Lozon, containing 77 documents (Exhibit 8).

The Oral Evidence Presented at the Summary Trial

[39] Mr. Reich, Mr. Camara and Mr. Graat were cross-examined on their affidavits.

[40] Ms. Lozon, the plaintiff's property manager from 1991 - 2003, had been examined pursuant to Rule 36 on December 2, 2014. Her testimony was videotaped and the videotape was viewed as part of the trial.

[41] Mr. Joel Corbett, a plumber retained by the plaintiff, and Ms. Froggett, a member of the plaintiff's board of directors, testified as part of the plaintiff's case.

[42] I note that the transcript of Ms. Lozon's examination is not part of the evidentiary record, nor is the transcript of the examination for discovery of Mr. Camara, dated May 9, 2012. Parts of his examination for discovery were read into evidence by Mr. Morrissey as part of the plaintiff's case.

The Sewage System

[43] On the land in question, the ground slopes downward from Hamilton Road which means that the townhouse basements are lower than the municipal sewer pipes and therefore, must be pumped uphill. Instead of constructing multiple sewage systems a single shared sewage system was developed that would be used by all of the complexes.

[44] Sewage flows from the townhouses by gravity to a central round buried tank. There are two sewage ejector pumps that are triggered once the water level reaches a certain height. The sewage then gets pumped through a pipe that connects to the City sewage line on Hamilton Road. The pump turns off when the water level has dropped below threshold level. South of the sewage pit are two large concrete retention tanks. If there is too much waste in the pit, the sewage flows to the retention tanks to avoid overflow. There is a switch that activates an alarm when the sewage level reaches unacceptable levels. The alarm is carried by a telephone line.

[45] Mr. Corbett, a licenced plumber, has serviced the plaintiff's sewage pumping system and described regularly testing the equipment and responding to service calls including on one occasion at 4:30 a.m. on a Saturday.

[46] He described the pumping station as having two electrical systems, one for the pump and one for the lights.

[47] He testified that the system has a very large tank, which is much too large for only 43 units.

[48] He described plugged pumps as being a common problem and various things such as flushable wipes and mop heads getting stuck in the pumps. As he

testified, the more items flushed into the pumps, the more potential for problems and the more the equipment gets used, the more it wears down.

[49] On cross-examination he acknowledged that he had no idea where a mop head that had caused a problem would have come from and the same is true for flushable wipes.

What does the evidence establish?

[50] Mr. Len Reich deposed that during the time he acted for the plaintiff, joint maintenance contributions were an ongoing issue. According to Mr. Reich, there "was a desire on the part of Oaklands and the plaintiff, if not Key Property, to have a new agreement drawn up to deal with matters not adequately covered in the original joint use and maintenance agreement but that during the interim the parties were using the terms of the original agreement as the basis for determining their respective contributions".

[51] The minutes of the plaintiff's board of directors held October 13, 1993, indicate that the Mr. Reich was instructed to obtain a joint maintenance agreement to deal with the costs for the pump house and any other expenses that should be shared. Correspondence was sent to Mr. Reich to that effect dated October 19, 1993.

[52] As the property manager for the plaintiff, Ms. Lozon followed up with Mr. Reich over the following months noting that the plaintiff was owed contribution from the owners of the units built by WMJO for their use of the pumping station and snow plowing.

[53] On February 16, 1994, Mr. Reich sent a form of joint use and maintenance agreement to Mr. Dean Holmes, who at that time was the property manager at Key Property. Mr. Holmes responded by noting that Key Property would be pleased to review the plaintiff's prior year expenditures in the context of its joint use and maintenance obligations and asked for particulars. Mr. Reich forwarded an accounting to Mr. Holmes later in February 1994.

[54] At one point in April 1994, emergency work was required in relation to the pumping station. Key Property was contacted because Ms. Lozon could not be reached. Key Property paid the related invoice and thereafter, Mr. Mota, an employee of Key Property, looked to the plaintiff for reimbursement as he wanted

to "discuss the administration of the cost sharing agreement as it relates to" that invoice.

[55] The plaintiff continued to follow up with Mr. Reich expressing disappointment that an agreement was not being finalized and Mr. Reich in turn followed up with Mr. Holmes.

[56] Mr. Holmes sent correspondence dated November 10, 1994, to Mr. Reich indicating that his interpretation of the agreement seemed to indicate that their "responsibility for cost sharing began from and after the date that the first unit is occupied in each phase, not the date that construction commenced" and if their interpretation was correct he requested that the plaintiff recalculate the charges.

[57] Thereafter, minutes of the plaintiff's board of directors indicate that Ms. Lozon was to "send a firmly worded letter" to Mr. Reich. Ms. Lozon did so December 12, 1994, directing Mr. Reich to take immediate action to have the joint use and maintenance agreement resolved and in place by January 15, 1995. The agreement was not signed.

[58] The plaintiff's board of directors convened a special meeting on May 29, 1995, at which Mr. Holmes attended. The minutes indicated, and as Ms. Lozon confirmed, there was optimism that a consensus could be reached with Key Property on a number of key issues.

[59] Ms. Lozon arranged a meeting with Mr. Holmes on June 14, 1995, and forwarded him a proposed agenda, a draft budget and a joint maintenance agreement.

[60] Ms. Lozon indicated that a new agreement was being drafted because, as she put it, there were issues in the original joint maintenance agreement that needed to be revised, relating to the roadways, the sidewalks, the lighting, the snow removal, access over certain areas and to be more equitable, it had to be revised to be fair to each party.

[61] She explained that references in the minutes of the meetings of the plaintiff's board of directors about the joint maintenance agreement not being resolved were references to the revised agreement they were trying to create. They continued to work on a revised joint maintenance agreement up to 1999, six years

after there had been preliminary discussions in that regard. This new agreement was never signed and she did not know why.

[62] Ms. Lozon was clear in her evidence that the original joint maintenance agreement (that is, the one registered on title) was the basis on which the plaintiff was seeking contributions from the other users of the pumping station. She was adamant that there was always an agreement respecting joint maintenance from the very beginning and it was only a revised arrangement that they were working towards concluding. As she reiterated, they were trying to make some changes because of the "makeup of the land and that sort of thing" to make it more equitable.

[63] The proposed form of agreement, which was never signed, included para. 3 as follows:

> The cost and expenses of maintenance, replacement, administration and repair of the pumping station and its facilities and without limiting the generality of the foregoing, its monthly maintenance costs, insurance, replacement costs, emergency services, telephone, hydro, electrical alarm, answering services, emergency pumping, and all costs and expenses payable for the maintenance, repair, replacement, administration and management of the pumping station shall be paid by all of the Parties in proportion to the number of individual units in each Parties' development from and after the date when the first unit in that development is occupied.

[64] By June 1995, as the minutes of the plaintiff's board of directors note, Key Property had paid all their share of the joint expenses claimed by the plaintiff. However, by February 1996 and into 1997, there were unpaid invoices again.

[65] Cornerstone became the manager of the WMJO property in April 1997. By December 1998, Cornerstone had paid the outstanding invoices. However, by September 1999, and into May 2000, the plaintiff's invoices were again not being paid.

[66] In May 2000, Ms. Lozon went to Cornerstone's offices to meet with Mr. Camara and Mr. Graat. She discussed the collection of money under the joint maintenance agreement and responded to their questions about the invoices from plumbers retained by the plaintiff which were claimed as part of the joint expenses.

[67] Ms. Lozon testified that Mr. Graat did not say at that meeting that he should not be billed for the pumping station expenses, nor did he state that WMJO was not responsible for its share of the pumping station expenses.

[68] Ms. Lozon further testified she was never given any indication during her period of management that the other condominium projects were not responsible for, and would not pay, a proportionate share of the pumping station costs.

[69] On October 11, 2000, Mr. Graat wrote a letter on behalf of Cornerstone querying why a damaged circuit board would not be covered by insurance. Again, he did not indicate that WMJO would not be responsible for its share of expense relating to the pumping station.

[70] In December 2000, Cornerstone paid all of the plaintiff's invoices which were outstanding, including the one Mr. Graat had inquired about. However, again in 2001 and 2002, WMJO did not pay the plaintiff's invoices.

[71] In 2002, under Ms. Lozon's direction, two small claims court actions were commenced seeking payment of outstanding invoices based on the terms of the joint use and maintenance agreement.

[72] In April 2003, the small claims court actions were resolved when all the outstanding invoices were paid in full.

[73] Thereafter, WMJO paid all the plaintiff's invoices for the balance of 2003, 2004 and 2005.

[74] In 2006, there was structural damage to the pumping station and the plaintiff included the cost of the repair in its invoicing. In 2006, Cornerstone paid what was described as a "regular" amount but did not pay any amount relating to the repair which it disputed.

[75] No payment was made in relation to the pumping station after 2006.

[76] According to the plaintiff's financial statements, the joint maintenance receivable as of its 2009 fiscal year end was $50,059.

[77] In April 2010, three small claims court actions were commenced and later combined and consolidated into this action.

[78] It is important to note that I found Ms. Lozon to be a very confident witness whose evidence was straightforward and precise. It appears that she maintained excellent records that allowed her to testify in this manner. I found her evidence completely credible and reliable. I note also that she has not acted as the plaintiff's property manager since 2003 when she retired. She is an independent and objective witness, which also enhances her credibility.

[79] The fact that a further joint maintenance agreement was not finalized does not detract from the plaintiff's claim in this action. It is clear that the owners of the condominium units that were connected to the pumping station expected to pay costs for that service.

[80] Oaklands pays its proportionate share.

[81] In addition, Key Property and WMJO's other property managers have also paid WMJO's proportionate share, although not on a timely basis.

[82] While there have been delays in payment and claims pursued in small claims court, WMJO through its property managers, paid the amount it was invoiced for its proportionate share of the costs in relation to the pumping station for more than ten years up to 2007.

[83] In his affidavit affirmed June 17, 2013, Mr. Graat deposed that he did not agree that WMJO should contribute to costs to maintain and operate the sewage pumping station owned and controlled by the plaintiff. He described the pumping station as "a pit with a pump that runs automatically". He further deposed that the amounts that the plaintiff was claiming were far beyond what he thought were appropriate.

[84] He affirmed that: "My view, on behalf of WMJO, was that it was under no obligation to pay anything for MCC 229's sewage pumping station and I (on behalf of WMJO or its condominiums), never agreed to pay."

[85] He also affirmed that there were occasional meetings with the plaintiff about the cost sharing but there was never any agreement made. He stated that he had settled the 2002 small claims court actions under protest.

[86] He further affirmed in para. 5 of his affidavit that:

> If MCC 229 had wanted WMJO to contribute something monthly that had a reasonable resemblance to the actual operating cost of two electric pumps running periodically I would have been receptive to agreeing to that. If they had wanted payment of a share of the actual cost of the periodic repairs required in pumping out and cleaning the pit once a year or so, I would have been receptive.

[87] Mr. Graat went on to indicate in his affidavit that he disputed other expenses sought by the plaintiff including administrative markups to the property manager, the cost of special pagers and attendance of the property managers at the site.

[88] Mr. Graat testified in that same vein during cross examination indicating that he expected that he would be charged for minor operating costs of the pumps and any additional hydro expense but the pumping station itself was, as he put it, "their problem".

[89] He further indicated in a subsequent affidavit affirmed February 11, 2015, that if WMJO's property manager made any payments towards the operating costs of the sewage pumping station as opposed to the shared access roads, it was done without his awareness.

[90] During his cross examination, it was put to Mr. Graat that from 1993 to at least 2005, there was never any communication from WMJO or its property manager, to the plaintiff or its property manager, that WMJO was not responsible for any pumping station costs. Mr. Graat responded that such a position was discussed in his office and his office must have conveyed that to the people responsible for the plaintiff. I cannot accept this assertion in the face of the payments made on behalf of WMJO and the fact that such an assertion is inconsistent with the evidence of Ms. Lozon whose testimony I have found to be credible and reliable.

[91] On cross-examination, Mr. Graat was referred to a payment of $4,695.39 made by Cornerstone on December 8, 2000, which included costs of the nature that he had stated would not be paid. Mr. Graat asserted that this payment "was a mistake". He testified that "someone paid it", it was not him and it was not approved by him.

[92] On re-examination, he explained that he has a significant number of units under property management, does not inspect all invoices, has probably 50 sub-

contractors and only once in a while would he conduct an audit and look at something.

[93] Mr. Camara was examined for discovery as a representative of Ayerswood and the other defendants. As he put it, in 2009, he was handed the file to look into the issue which is before the court in this summary trial. He indicated that it was his understanding from prior property managers that all of the condominium corporations were to contribute to the expense of the pumping station.

[94] Indeed, as previously set out, Mr. Graat on behalf of Junsen was a signatory to the agreement that stated that each phase of the project would be responsible for a proportionate share of the costs and expenses of maintenance, repairs and/or replacement of the joint facilities which included the pumping station, the internal road system and certain utilities and services. He also was a signatory to the development agreement on behalf of Trenlon and was clearly aware that Trenlon, as the then property owner and anticipated developer of all 156 units, was liable to maintain and operate the pumping station.

[95] It is impossible to accept Mr. Graat's assertion that payments made by WMJO's property manager over this extensive period of time were mistakes.

Issue Number 1: Is it possible for the plaintiff to advance its claim?

[96] Section 23(1) of the *Condominium Act*, 1998, provides that a condominium corporation may, on its own behalf and on behalf of an owner commence, maintain, or settle an action for damages and costs in respect of any damage to common elements, the assets of the corporation, or individual units and with respect to a contract involving the common elements or a unit even though the corporation was not a party to the contract in respect of which the action was brought.

[97] Section 23(2) obliges the corporation to give written notice of the action to all owners unless the action is to enforce the corporation's lien or the action is commenced in the small claims court.

[98] The defendants asserted that unless such notice had been given by the plaintiff this action should be stayed because each unit owner faces potential liability, for example in relation to a costs order.

[99] Ms. Froggett testified that she is aware of this litigation. She has resided in the condominium project since 1991. It is not entirely clear from the evidentiary record that each unit owner was made aware that the small claims court actions had been consolidated into this action. However, I am satisfied that this action should not be stayed for that reason.

[100] In addition, the defendants noted that to the extent that the plaintiff's claim is based on unjust enrichment, it is not clear that the plaintiff can advance an action as such a claim is not an action based on contract. However, as the defendants acknowledged, in *1420041 Ontario Inc. v. 1 King West Inc.*, 2012 ONCA 249, the court held that s. 23 should be given a broad and liberal interpretation.

[101] Furthermore, as Mr. Morrissey asserted on behalf of the plaintiff, there is a contract in existence which is binding on successors in title and while certain obligations are not enforceable as positive covenants running with the land nevertheless, s. 23 should not be construed so narrowly so as to prevent the plaintiff pursuing this action.

[102] Further, the plaintiff countered the defendants' arguments by its submission that its right to sue is not limited to the authority set out in s. 23 of the *Condominium Act*, and it has the right to sue pursuant to the *Legislation Act*, 2006, S.O. 2006 c. 21, and its predecessor legislation, the *Interpretation Act*, R.S.C., 1985, c. I-21, which is to be given fair, large and liberal interpretation and which applies to every statute of Ontario in accordance with ss. 46, 47 and 64. As a result, the provision of s. 23 of the *Condominium Act* simply expands on the powers conferred on a corporation by the *Legislation Act*.

[103] In relation to the issue of notice, the plaintiff submitted that it is only required to give notice when it sues in a representative capacity to advance a right of unit owners pursuant to s. 23. Furthermore, in relation to this case the plaintiff notified the unit owners in writing prior to the Superior Court action being commenced and therefore, adequate notice has been provided in any event.

[104] I agree with the plaintiff that it is advancing its claims against the defendants independent of any rights conferred by s. 23. This is consistent with the statement in *York Condominium Corp. No. 420 v. Deerhaven Properties Ltd.*, [1982] O.J. No. 3592 (High Crt.), 33 CPC 65, that s. 14 (*Condo Act*) [now s. 23] was not to restrict the broad power to sue previously held under s. 9(18) but rather to extend those powers by providing under s. 14(1) a right to sue and recover

damages and costs in respect to not only the common elements but with respect to the assets and individual units of the corporation as well and the Legislature intended to confer a right to sue on contracts to which the corporation was not a party.

[105] More recently, in *York Condominium Corp. No. 137 v. Hayes*, 2012 ONSC 4590, the court concluded at. para.34 that s. 23 deals with two particular types of actions: 1) an action for damage to common elements, assets of the corporation or individual units; or 2) an action with respect to a contract involving the common elements or a unit where the corporation was not a party to the contract in respect of which the action is brought. Section 23 specifically provides that it is "in addition to any other remedies" that the condominium may have.

[106] I am satisfied that the plaintiff may pursue this action as constituted.

Issue Number 2: Which of the defendants are potentially liable to the plaintiff?

[107] Ayerswood, as the property manager retained by WMJO, has no liability to the plaintiff. I agree with the submission of the defendants that there is no connection between the plaintiff and Ayerswood and simply no basis in law or equity upon which Ayerswood could be liable.

[108] The three defendant condominium corporations are creations of statute under the *Condominium Act*, 1998. They do not own the units or common elements that are producing the sewage that is pumped away by the plaintiff's sewage pumping station. I agree with the submission on behalf of these defendants that they cannot be liable on the basis of contract and there is no basis for equitable liability in favour of the plaintiff.

[109] With respect to the remaining defendant WMJO, the following is stated in para. 15 of the factum filed on behalf of the defendants:

> WMJO Limited is the unit owner of all the units in MCC 282, 492 and 500, so it can be a successor in title. The sewage that gets pumped away is the wastewater of its tenants. If there is any liability on the part of the defendants,

> it can only be WMJO. This is said as WMJO is the only defendant that is a successor in title (potential contractual liability) and only it arguably indirectly derives a benefit from the units it owns being pumped to the municipal sewer from the sewage pumping station.

[110] I agree with this submission and find that WMJO is the only defendant which is potentially liable to the plaintiff.

Issue Number 3: Is WMJO liable to the plaintiff?

[111] The formula for cost sharing set out in para. 3 of the 1995 agreement, which was drafted but never signed, adopted the approach used in the joint use and maintenance agreement registered on title. The three defendant condominium corporations were permitted to connect into the sewage system with the expectation that costs would be shared which, in fact, occurred over a considerable period of time.

[112] The plaintiff submitted that payments have been made in accordance with the agreements and in consideration of those payments. WMJO received what it expected. That is, the plaintiff provided services to WMJO and WMJO expected to pay for them in accordance with the terms and provisions of the joint use and maintenance agreement registered on title which Mr. Graat, the director and officer of WMJO, was clearly aware of and in accordance with the unsigned agreement with consistent terms prepared after the WMJO units were connected to the system.

[113] The plaintiff stated the following at para. 35 of its factum:

> Where services are being rendered with knowledge on the part of the person receiving them that they are rendered in expectation of payment, the ordinary implication is that the services are to be paid for on the terms that are made known when the services are accepted. The person benefitting from such services will be taken to having agreed to pay for the services and the law will find an enforceable obligation based on contract. (*St. Lawrence Service Stations Ltd. v. Hand*, [1938] S.C.J. No. 50, para. 3; *St. John Tug Boat Co. Ltd. v. Irving Refining Ltd.*, [1964] S.C.R. 614; *Standard Radio Inc. v. Sports Central Enterprises Ltd. (c.o.b. Sports Central Pro Shop)*, 2002 BCSC 460, 2002 CarswellBC 691 (S.C.) at para. 7.)

[114] The plaintiff submitted that WMJO, as the owner of the units receiving services from the plaintiff, is bound by the terms of the unsigned agreement.

[115] The plaintiff emphasized that the consideration for its contract with WMJO is the fact that it has discontinued its small claims court actions and more importantly, it has not interfered with the connection of WMJO's units to the sanitary sewer system.

[116] Furthermore, the plaintiff submitted that the terms of the contract were essentially acknowledged and agreed to by the history of payments by WMJO of a *pro rata* share of expenses of operating and maintenance costs. I agree that these circumstances are sufficient to establish a contract between the plaintiff and WMJO in accordance with the reasoning of the court in *St. John Tug Boat Co. v. Irving Refinery Ltd.*, [1964] S.C.R. 614 where the Court stated:

> But if a person knows that the consideration is being rendered for his benefit with an expectation that he will pay for it, then if he acquiesces in its being done, taking the benefit of it when done, he will be taken impliedly to have requested its being done: and that will import a promise to pay for it.

[117] And in *Standard Radio Inc. v. Sports Central Enterprises Ltd.*, 2002 BCSC 460 at para. 7, where the court stated:

> If the Plaintiff shows that services have been delivered to the defendant with the expectation of payment, and if a defendant has received such services in circumstances in which a reasonable person ought to know that they are given in expectation of payment by him, the law will find an enforceable obligation based on contract. (*St. Lawrence Service Stations Ltd. v. Hand*, [1938] 2 D.L.R. 412 (S.C.C.).)

[118] I turn next to consider the plaintiff's claim for unjust enrichment. The plaintiff asserted that such a remedy is not precluded by the principles expressed in *Amberwood*. It noted that a claim for unjust enrichment could not have been advanced by the plaintiff in *Amberwood*.

[119] *Rhone v. Stephens*, [1994] 2 all E.R. 65 (UKHL) was a decision referenced by the Court of Appeal in *Amberwood*. That case is relied on by the defendants here, just as it was relied on in *Amberwood*. However, in my view, the important point from *Rhone v. Stephens* is the statement in that case that "equity cannot compel an owner to comply with a positive covenant entered into by his predecessors in title without flatly contradicting the common-law rule that a person cannot be made liable upon a contract unless he was a party to it. Enforcement of

a positive covenant lies in contract; a positive covenant compels an owner to exercise his rights."

[120] I agree with the position of the plaintiff that it is not seeking to enforce the positive covenant, rather, it is seeking a remedy based on unjust enrichment or endeavouring to pursue a claim based on the defendants' acceptance of a contract.

[121] In *Kerr v. Baranow*, 2011 SCC 10, the Supreme Court of Canada at para. 32 observed that unjust enrichment permits recovery whenever the plaintiff can establish three elements: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment.

[122] The Court explained further at para. 38 that for the first requirement - enrichment - the plaintiff must show that it gave something to the defendant which the defendant received and retained. The benefit need not be permanent, but it must be tangible and it may be positive or negative.

[123] The Court explained further at para. 39 that the second requirement - a corresponding deprivation - is material only if the defendant has gained a benefit or been enriched. The second requirement obliges the plaintiff to establish that the defendant's enrichment corresponds to a deprivation the plaintiff has suffered.

[124] With respect to juristic reasons, the Court stated at para. 41 that such reasons might include an intention to make a gift, a contract or a disposition of law. The court noted that this latter category generally includes circumstances where the enrichment of the defendant at the plaintiff's expense is required by law, such as where a valid statute denies recovery. The Court made clear that there was not a "closed list" of juristic reasons.

[125] The plaintiff submitted that in this case WMJO's enrichment is clear because it has been saved considerable expense by connecting to the plaintiffs' sanitary sewage system instead of building its own. In addition with respect to further ongoing operations, WMJO has no responsibility to post the bond, to manage the system, or to deal with contractors and the Ministry of the Environment.

[126] I disagree with the position advanced by the defendants that the plaintiff has not made out a corresponding depravation. The plaintiff has experienced

corresponding deprivation by virtue of the fact that since 2006, it has received no compensation from WMJO and also by the fact it is operating a system much larger than is required for its 43 units.

[127] The plaintiff submitted that there is no juristic reason to deny recovery because the defendants cannot establish that their enrichment can be justified either by public policy or by their reasonable expectations.

[128] The unjustness of the circumstances arises here because the positive covenant cannot be enforced against WMJO as a subsequent landowner.

[129] The defendants assert that as the Court acknowledged in Amberwood, the principle established by that case may produce unfairness.

[130] Mr. Turton on behalf of the defendants asserted that the policy considerations in Amberwood provide a juristic reason for the plaintiff to be denied a claim in unjust enrichment.

[131] However, I disagree with the defendants that the fact that the positive covenant cannot be enforced disentitles the plaintiff from pursuing this claim of unjust enrichment. As the plaintiff noted, in *Deglman v. Guaranty Trust Co. of Canada*, [1954] S.C.R. 725, a remedy was provided on the basis of unjust enrichment where a contract could not be enforced. Similarly, in *Guaranty Properties Ltd. v. Edmonton (City)*, 1998 ABQB 68, restitution was awarded to a contractor for a value of services it provided to a municipality after it was discovered that it had no authority to enter into the contract with the contractor and the contract was unenforceable.

[132] In my view, the plaintiff is not seeking to enforce a positive covenant by pursuing a remedy for unjust enrichment.

[133] I find that the plaintiff's submission succinctly set forth in para. 49 of its factum has merit:

> It is submitted that the decision in *Amberwood* does not and was not intended to restrict a party's right, in the face of a contract that cannot be enforced, to seek restitution on the basis of unjust enrichment where the party is able to establish the "three elements" of unjust enrichment…

[134] *Garland v. Consumers' Gas Co.*, 2004 SCC 25, is the leading decision addressing the absence of juristic reason. At para. 44, the Court stated that first, the plaintiff must show that no juristic reason from an established category exists to deny recovery and noted that the established categories that can constitute juristic reasons include a contract, a disposition of law, a donative intent and other valid common-law, equitable or statutory obligations. The plaintiff will have made out a *prima facie* case if there is no juristic reason from an established category. That *prima facie* case however, is rebuttable if the defendant can show reason why restitution should not be ordered and it is entitled to retain the enrichment. The Court stated at para. 46 as follows:

> As part of the defendant's intent to rebut, courts should have regard to two factors: the reasonable expectations of the parties and public policy considerations. In these circumstances there is no contract that would constitute a juristic reason, there is no disposition of law and there is no donative intent and no valid common-law, equitable or statutory obligations. In other words there is no juristic reason from an established category.

[135] In this case, the defendants have attempted to rebut the plaintiff's right to restitution. Here, it cannot be said that WMJO and its director and officer had a reasonable expectation that it would not pay for the services it is obtaining from the plaintiff. Indeed, as I have found, it was clear that there was an expectation that these services would be paid for.

[136] In terms of remedy, the plaintiff relied on a statement of Cromwell J. at para. 79 in *Kerr v. Baranow*, 2011 SCC 10, where, quoting Professor Friedman, he stated:

> Where a claim for unjust enrichment has been made out by the plaintiff, the Court may award whatever form of relief is most appropriate so as to ensure that the plaintiff obtains that to which he or she is entitled, regardless of whether the situation would have been governed by common-law or equitable doctrines or whether the case would formally have been considered one for personal or a proprietary remedy.

[137] The plaintiff submitted that the defendants are attempting "to subjectively devalue the benefit." The plaintiff urged that I consider the remedy provided in unjust enrichment by the court in *Point Abino Assn. v. Lee*, [1997] O.J. No. 3262 (Gen. Div.). In that case, the plaintiff maintained a private road for the benefit of all land owners, including the defendant, incurring expenses in the nature of

snowplowing, general road maintenance, providing security to the development, by paying municipal taxes and maintaining liability insurance coverage. The court found that the plaintiff should succeed in its claim for unjust enrichment and granted the plaintiff a declaration that the defendant was obliged to pay an equitable share of the costs incurred for the benefit of all land owners. Indeed in that case, the court issued a declaration "to the effect that the association is entitled at law to collect from the defendant the amount of yearly fees it stipulates as appropriate according to its own bylaws" (see para. 8).

[138] I agree with the plaintiff that the joint use of the sewage system by each townhouse connected to it reflects something akin to a common venture. In these circumstances, the appropriate order is that WMJO pay a *pro rata* share of the expenses to maintain and operate the plaintiff's private sewage system.

[139] This is completely consistent with what Trenlon expected when it entered into the development agreement with the City. It is also completely consistent with what Mr. Graat was aware of when he signed the joint maintenance agreement. In addition, it is completely consistent with the history of payments by the property managers retained by WMJO. It is a fair and just valuation of the benefits and services given by the plaintiff to WMJO.

[140] In other words, this finding that the declaration sought by the plaintiff is the appropriate remedy to resolve its claim in unjust enrichment is consistent with the fact that by their actions, words and payments WMJO adopted the formula created by the joint maintenance agreement which was repeated in the proposed new joint maintenance agreement presented in 1995.

[141] If the issue of costs cannot be resolved, Counsel may make brief written submissions in the next 45 days.

"Justice L.C. Leitch"
Justice L.C. Leitch

Released: July 17, 2015

CITATION: Middlesex Condominium Corporation 229 v. WMJO Limited, 2015 ONSC 3879
COURT FILE NO.: CV-10-1864
DATE: July 17, 2015

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N :

Middlesex Condominium Corporation 229

Plaintiff

- and -

WMJO Limited, Ayerswood Development Corporation, Middlesex Condominium Corporation 282, Middlesex Condominium Corporation 492 and Middlesex Condominium Corporation 500

Defendants

REASONS FOR JUDGMENT

LEITCH J.

Released: July 17, 2015