In the Provincial Court of Alberta

Citation: Progressive Property Management v. Condominium Plan No. 842 1517, 2014 ABPC 78

Date: 20140404
Docket: P1290301691
Registry: Edmonton

Between:

Progressive Property Management Ltd.

Plaintiff

- and -

The Owners: Condominium Plan No. 842 1517

Defendant

Reasons for Judgment of the Honourable Judge G.W. Sharek

[1] This matter came before me for trial on November 4th, December 16th, 17th, 2013 and February 28th, 2014 and relates to fees sought to be collected by the Plaintiff as a property manager from the Defendant Condominium Corporation, and a Counterclaim by the Condominium Corporation for losses alleged to have been incurred as a result of mismanagement by the Plaintiff.

FACTS

[2] The Plaintiff, Progressive Property Management Ltd. ("Progressive"), is in the business of management of condominium properties, and the Defendant, The Owners: Condominium Plan No. 842 1517 ("the Corporation") is a condominium corporation which governs a condominium building commonly known as Royal Oak Towers, in Edmonton, Alberta (the "Condominium Building"). Royal Oak Towers is a 71 suite, 10 storey building, initially constructed in 1969 as an apartment building, and converted to a condominium in 1984.

[3] The "Developer" of the condominium project as shown on the condominium plan registered July 12th, 1984, Exhibit 51, was 226882 Alberta Ltd.. 226882 Alberta Ltd. remained the owner of all the units and common property in the Condominium Building until 2007. As shown in Exhibit 61, 226882 Alberta Ltd., sold the Condominium Building on March 16th, 2007, to Voipus Canada Ltd., "and/or its Nominee/Assignee", and Voipus Canada Ltd. subsequently appointed Royal Oak Tower Corp. as its Nominee.

[4] Ownership in the Condominium Building was then transferred by 226882 Alberta Ltd. to Royal Oak Tower Corp. by transfer dated April 5th, 2007, Exhibit 62, for the sum of $11,715,000.00. The Transfer of Land was registered on June 18th, 2007, at the Land Titles Office. As there is no evidence to suggest otherwise, I find that the transactions between 226882 Alberta Ltd. and Voipus Canada Ltd., with Royal Oak Tower Corp. as its Nominee were arm's length transactions, for valuable consideration.

[5] Exhibit 52 is three volumes of historical searches done on each of the 71 units in the Condominium Building, and generally establishes that each of the units in the Condominium Building were transferred by Royal Oak Tower Corp. to individual owners on June 18th, 2007.

[6] The evidence, particularly Exhibit 59, establishes that the first Directors of the Corporation took those positions on April 4th, 2008, which suggests that prior to that time, 226882 Alberta Ltd. had not appointed or elected Directors prior to transferring the Condominium Building to Royal Oak Tower Corp. in April, 2007, and that Royal Oak Tower Corp. did not elect or appoint a Board of Directors until April, 2008.

[7] Exhibit 1 is an Agreement entered into between the Plaintiff and the Defendant dated June 1st, 2007, wherein the Plaintiff was hired to manage the condominium ("the Management Agreement").

[8] Paragraph 1(a) of the Management Agreement provided as follows:

> "1. a) The Corporation hereby contracts with the Manager exclusively to manage the Condominium for a period of one year from the first day of June, 2007, and thereafter for yearly periods unless on or before sixty (60) days prior to the expiration of the initial term, and sixty (60) days' notice prior to the expiration of any such renewal period, either party hereto shall notify the other in writing that it elects to terminate this Agreement, in which case this Agreement shall be terminated at the end of said period, subject to earlier termination as hereafter provided; and further subject to Section 17 of the Act."

[9] Initially, Progressive was to be paid $30.00 "per door, per month", and the evidence of Jo-Anne McGillivray, who testified on behalf of the Plaintiff, was that sometime around April 2008, Progressive agreed with the Corporation that Progressive's fees would be reduced to $25.00 per door, per month, effective June 1, 2008. The fees remained at $25.00 per door, per month, until the contract of Progressive was terminated. The Management Agreement was signed by Kevin McGillivray who was the President and sole shareholder of Progressive, and by Najeb Ammache, on behalf of the Corporation. Mr. Ammache is described in the banking documents dated June 2007, Exhibit 2, as a "board member". The evidence established that Mr. Kevin McGillivray, at all relevant times until January 2011, was a member of the Board of Directors of the Corporation ("the Board").

[10] Generally, according to the evidence of Ms. McGillivray, matters between Progressive and the Board went relatively smoothly from 2007 until early 2011, when new members of the

Board were elected. In fact, the Annual General Meeting Minutes of January 10, 2011, Exhibit 8, state as follows:

> "Doreen [Blair] spoke on behalf of the Board and noted that Progressive has done an excellent job managing the building, keeping the expenses down, collecting the condo fees and overall managing of the building."

[11] Ms. McGillivray testified that difficulties arose in early 2011 with a new Board member, Radivoje Ugljesic. In summary, she testified that Mr. Ugljesic was very aggressive in his approach and was very demanding regarding such things as preparation of meeting minutes. For example, Exhibit 12 was presented as minutes of the Board meeting of February 9, 2011, which Mr. Ugljesic had reviewed and requested be amended to reflect more details of the meeting, particularly the viewpoints which he himself had expressed at the meeting. Ms. McGillivray, in her emails to the president of the Board in early 2011, such as Exhibit 11, complained that Mr. Ugljesic was berating anything that anyone had done, and in her testimony she stated that Mr. Ugljesic was harassing her, that she was being constantly ridiculed by him and that she felt "very attacked". She said that she concluded that she could not work in that environment as she did not feel comfortable or safe at Board meetings. Eventually, Ms. McGillivray stopped attending the Board meetings, leaving the Board with materials in advance of the meetings on such matters as bank accounts and condominium activities, which she said would have been sufficient for the Board to conduct their business in her absence.

[12] Specifically, Ms. McGillivray did not attend Board Meetings held March 21st and April 19th, 2011, and she testified that she met with the Board President, Doreen Blair, at length prior to each meeting, reviewed relevant matters, and provided back-up materials to her for each meeting.

[13] It is apparent from Exhibits 8 and 29 that Ms. McGillivray attended the Annual General Meeting held January 10th, 2011, and the Board meeting of February 9th, 2011.

[14] Paragraph 8 of the Management Agreement requires that the Manager attend 9 meetings of the Board per year, plus the Annual General Meeting. The Contract is not clear on whether this is to be the calendar year or the contractual year running from June to May. In any event, there is no evidence that Ms. McGillivray or Progressive failed to attend the required number of meetings in any given year. The only evidence on that point is that they did not attend the March and April 2011 meetings prior to receiving notice of termination of their Management Agreement.

[15] Ms. McGillivray was cross-examined at some length with respect to her failure to deliver documents to the Board as they requested, particularly the Management Agreement between Progressive and the Corporation, dating back to 2007. Ms. McGillivray was adamant in her direct and cross-examination that she provided all requested materials to either the president of the Board, Doreen Blair, or the secretary, Sharon Gregorash. Exhibit 13 is an email that does confirm that Ms. McGillivray provided Ms. Gregorash with a copy of the Management Agreement, in that she offered to make one available for pick up, and one was picked up on behalf of Ms. Gregorash on March 21st, 2011. She said that at some point, she had been directed

by the Board not to provide documents directly to Mr. Ugljesic, and she took the position that she was to report to the Board as a whole, and not to individual members, such as Mr. Ugljesic.

[16] Paragraph 10 of the Management Agreement provides:

> "10. The Board of the Corporation shall, from time to time, designate a single individual and appointed alternate who shall be authorized to deal with the Manager or any matter relating to the management of the Condominium. The Manager is directed not to accept directions or instructions with regard to the management of the Condominium from anyone else. In the absence of any other designation by the Corporation, the President of the Board shall have this authority."

[17] There was no evidence to suggest that an alternate was appointed by the Board as contemplated in that paragraph.

[18] Considerable evidence was led with respect to bed bug issues, including evidence of Mr. Ugljesic, Ms. Marlene Glebe and Mr. Jay Harlow.

[19] Mr. Ugljesic owned one unit in Royal Oak Towers, which he rented out, and in late 2010, he became concerned about bed bugs which apparently were present in a neighbouring unit. The Corporation had been addressing the issue of bed bugs as early as September 22nd, 2010, as shown in Exhibit 15, which are minutes of a Board Meeting of that date. The minutes reveal that pest control was discussed by the Board, including whether a bed bug dog should be utilized to partly address the problem. A motion to utilize a dog was defeated unanimously at that meeting, and the minutes show that Progressive contacted their contractor, Birch Fumigators, who recommended that the situation be monitored, and who did not feel that it would be prudent to have a dog go through the property at that time.

[20] In December, 2010, as shown on Exhibit 54, Mr. Ugljesic, who was not yet a Board Member, complained to Progressive about how the bed bug problem was being handled. Progressive responded with an e-mail dated December 13th, 2010, outlining the measures they had taken to address the bed bug problem, including retaining a pest control company and conducting inspections and treatments. Mr. Ugljesic then indicated his disagreement with Progressive about how the bed bug issue was being addressed, and accused Progressive of having "a HUGE problem with listening to other people [sic] opinions".

[21] Mr. Ugljesic was acclaimed as a Director at the Corporation's Annual General Meeting on January 10th, 2011. Mr. Uglesic subsequently attended the Board Meeting on February 9th, 2011, and as shown on Exhibit 12, his revised minutes, he complained vociferously about how the bed bug issues had been handled. The original form of minutes of that February 9th, 2011 meeting are Exhibit 29, and Mr. Ugljesic's proposed revised minutes are Exhibit 12. Mr. Ugljesic also voiced a number of other complaints as shown on Exhibit 12 regarding the financial affairs of the company and Directors' positions and protocol.

[22] Mr. Ray Leblanc, who was a Board member from 2008 to shortly after the February 9th, 2011 meeting, also testified, and he stated that to that point, bed bugs were not being investigated by dogs as the Board felt they were too expensive. Mr. Leblanc also testified that, in his experience on the Board, he felt that Progressive conducted their business professionally and that they ran the condominium well. He described the February 9th, 2011 meeting as an attack by Mr. Ugljesic on Progressive, stating that Mr. Ugljesic was accusatory, and did not back down. Mr. Leblanc resigned as a Board Member shortly after that meeting, and he is no longer an owner of a unit in Royal Oak.

[23] Mr. Jay Harlow was a pest control contractor hired by the successor property manager to Progressive. He was qualified in this trial as a pest control expert, dealing with bed bugs, notwithstanding that he was not entirely objective. Mr. Harlow provided some detailed evidence about the proper protocol to deal with bed bugs, including evidence about how difficult they are to identify, and the distinction between suspected and confirmed bed bug problems. He also addressed the issue of canine inspections and stated that they were introduced to the marketplace 3 ½ years ago or sometime in early 2011. He also testified that using dogs for bed bug inspection is approximately four times as expensive as other methods, and that in any event, a manual inspection would be the first step in any treatment protocol. He did not provide a direct opinion about the appropriateness of the pest control efforts of Birch Fumigators.

[24] Ms. Marlene Glebe, who was elected to the Board by acclamation in February 2011, and subsequently became the Chair of the Board, also testified. She also acted as the agent of the Corporation in this litigation, and conducted the trial on its behalf.

[25] Her testimony was essentially provided by reading a lengthy statement that she had prepared, Exhibit 53, which contains a number of complaints against Progressive, including the bed bug infestation. Her complaint regarding bed bugs was that the new pest control company, hired after Progressive's termination, determined that the building was infested to such a large degree because only units identified as being infested had been treated, not the neighbouring units on all sides and up and down. This essentially was the view of Mr. Harlow.

[26] Both Mr. Ugljesic and Ms. Glebe had a number of other complaints against Progressive, including the cost of cleaning contracts, roof repairs, garbage chute issues and cleanliness of the building. In summary, their complaints were that the cleaning contractors were too expensive, and the roof repairs were being done instead of having the roof replaced, resulting in wasting money on numerous patches that had been done over the years prior to replacement.

[27] With respect to the roof repairs, and the allegation that Progressive ought to have directed replacement of the roof, Paragraph 11(a) of the Management Agreement is pertinent:

> "11.(a) The Manager shall have no authority without express direction to the contrary, to make any physical or structural changes in the Condominium or to make any other major alterations or additions in or to any building or equipment therein, except such emergency repairs which are immediately necessary for the preservation and safety of the Condominium or the safety of the owners and

> occupant or as required to avoid the suspension of any necessary service to the Condominium."

[28] Mr. Ugljesic and Ms. Glebe also had complaints about lack of disclosure and poor financial controls utilized by Progressive. Ms. Glebe also had a number of concerns about the post termination activities and release of funds by Progressive to the Corporation after the termination of Progressive.

[29] By letter dated May 31, 2011, the Defendant purported to terminate the Management Agreement, stating as follows:

> "Please be advised that, pursuant to Section 17 of the Condominium Property Act, you are hereby provided with notice that the Condominium Management Agreement will be terminated effective July 31st, 2011".

[30] Progressive turned over the Condominium Corporation's reserve funds on August 11th, 2011, and partial operating funds were made available by bank draft on August 19th, 2011, with a second payment of operating funds of approximately $18,000.00 paid October 12th, 2011. The evidence was not clear on when that second installment of operating funds was made available, and Ms. Vu, the treasurer of the Corporation at the time, testified that Ms. McGillivray had promised that those funds would be available by the end of September 2011, and that Ms. Vu was told by her bank that the funds were available for pick-up and Ms. Vu picked them up at the bank on October 12th, 2011.

CLAIMS OF THE PARTIES

[31] The Plaintiff, Progressive, claims the sum of $18,637.50 being $25.00 per door, per month, for 71 units, for 10 months which they allege was remaining on their contract which they maintain ran from June 1st, 2011, to May 31st, 2012. They maintain that the Management Agreement was not properly terminated, as pursuant to paragraph 1(a) of the Management Agreement as quoted above, they were to be given 60 days' notice prior to June 1st, 2011, of termination of their contract to be effective May 31st, 2011. They claim that as the notice was not served within that 60 day period, their contract was in effect until May 31st, 2012.

[32] The Defendant maintains that pursuant to Section 17 of the *Condominium Property Act*, c. C-22, RSA 2000 ("The *Act*") the Management Agreement was one which had been entered into in June 2007, by a developer and could therefore be terminated notwithstanding anything contained in the Management Agreement, at any time, on 60 days' notice, which the Board provided.

[33] The Defendant furthermore claims that the Management Agreement specifically states that any disagreements with respect to a dispute shall be determined by arbitration and that section 6 of the *Arbitration Act*, c. A-43, RSA 2000, dictates that this Court has no jurisdiction to hear this matter.

[34] The Defendant also alleges that the Management Agreement was terminated for cause, and pursues a Counterclaim in the amount of $25,000.00, although they allege that damages suffered by them at the hands of the Plaintiff or Defendant by Counterclaim considerably exceed that amount, which of course is the maximum jurisdiction of this Court. Those claims relate to alleged bed bug problems not properly addressed by Progressive, mismanagement of utilities, roof repair issues, garbage issues, loss of interest and bank charges, and failure to account for monies held in trust.

ANALYSIS

(a) Arbitration

[35] The Defendant, in its Dispute Note, maintained that this Court should not hear this dispute, as section 14 of the Management Agreement required that the matter be heard by arbitration, and that pursuant to section 6 of the *Arbitration Act*, this Court had no jurisdiction to hear this matter.

[36] No preliminary application was brought by the Defendant to address this issue, and while the issue was raised in the Defendant's opening statement, and during the course of the trial, the Defendant permitted the trial to proceed for four complete days of testimony and argument without applying to have the arbitration issue addressed.

[37] Ultimately, during closing argument, the Defendant conceded that because the parties had gone through a lengthy trial and a review of the issues, the Defendant had decided not to pursue the arbitration issue. Hence, I need not address that matter further.

(b) Liability

(i) Did the Defendant have just cause for termination of the Management Agreement?

[38] The first issue to address is whether the Corporation had just cause to terminate the Management Agreement without notice due to failure of Progressive to comply with the terms of that Management Agreement.

[39] The primary complaint of the Corporation relates to the bed bug issue, and indeed this issue appears to be the gestation of the fundamental problems between the two parties. Mr. Ugljesic was unhappy as early as December 2010, prior to becoming a Board member, about how the bed bugs were being dealt with, and in his e-mail of December 14, 2010 stated "I fill [sic] [Progressive] Management is upset with me even before talking to me and without giving me a chance to say my opinion". After he became a Board member in early 2011, this issue rose to the top of Mr. Ugljesic's complaint list and the concerns of Corporation. He felt that his concerns were not being properly considered, and that appropriate action was not being taken by Progressive and their contractor, Birch Fumigators. However, the evidence is clear that in September 2010 the Board unanimously voted down a motion to utilize canine inspections, as they were too expensive. Birch Fumigators had recommended that the situation be monitored,

and the Board accepted this recommendation. While Mr. Harlow testified that his company later carried out more extensive steps to remediate the bed bug problem, there is no evidence to support a finding that Progressive was negligent in hiring Birch Fumigators, or indeed that Birch Fumigators were negligent in their initial approach to these problems. Progressive hired a company which they believed to be experts in the field, and there is no reason suggested that they could not rely upon the recommendations of Birch, which they did. The fact that the bed bug problem worsened, or that newer technologies evolved, such as canine inspections, is not sufficient to establish that Progressive was negligent in how they handled the bed bug issue.

[40] Furthermore, Paragraph 10 of the Management Agreement referred to above specifically directs the Manager not to accept directions or instructions with regard to the management of the condominium from anyone else but the Board's designate or alternate. The designate in this case would be Doreen Blair, who was President of the Board, and there is no evidence of any alternate having been appointed. Hence, Progressive was specifically instructed not to accept directions or instructions from Mr. Ugljesic either in his capacity as an Owner or as a Board Member. Contrary to his e-mail of December 14th, 2010, Progressive was not bound to consider Mr. Ugljesic's opinion regarding the bed bug issue, and any failure to do so on their part did not constitute cause for termination of the Management Agreement.

[41] A further concern of the Corporation about Progressive's management related to delay in providing a budget, namely on April 27th, 2011, when it was due April 2nd, 2011. While this may be in contravention of the Management Agreement, particularly paragraph 3(c), there is no evidence that this delay caused any inconvenience, expense or even embarrassment to the Corporation. In fact, Mr. Bill Kerr, the principal of the successor to Progressive, who was also qualified as an expert in condominium property management, testified that he has not always met deadlines for submission of budgets and that was usually a matter out of his control, or something that "slips through the cracks".

[42] This breach therefore is not so significant as to have provided the Corporation with a basis on which to terminate the Management Agreement for poor performance.

[43] The next complaint of the Corporation is that Progressive failed to attend meetings as required by the Management Agreement, particularly the meetings of March and April 2011. Exhibit 53, which is Ms. Glebe's lengthy statement, stated that the budget issue and the failure to attend these two meetings prompted the Board to make a decision that they "needed to hire a different management company".

[44] Paragraph 8 of the Management Agreement requires that Progressive attend nine meetings of the Board per year plus the Annual General Meeting. There is no evidence that Progressive failed to attend these ten meetings as required. On the contrary, the evidence is that Ms. McGillivray on behalf of Progressive, attended the Annual General Meeting of January 10th, 2011 and the meeting of February 9, 2011. Furthermore, I find that there was some justification for Ms. McGillivray choosing not to attend those meetings in March and April, 2011. Mr. Leblanc testified that Mr. Ugljesic's conduct at the February 2011 meeting was an attack by Mr. Ugljesic against Progressive, and that he was not backing down. The events of that meeting prompted Mr. Leblanc to retire from the Board. I accept Mr. Leblanc's testimony, as he has no

vested interest in the outcome of this trial, as he is no longer a Board member nor a unit owner. Furthermore, Mr. Ugljesic's email of December 14, 2010, and his proposed amendments to the February 9th, 2011 meeting minutes as shown on Exhibit 12, confirm Mr. Leblanc's testimony that Mr. Ugljesic was acting in an accusatory manner toward Progressive. Mr. Leblanc's words were that after that meeting he'd "had enough" and that was his last meeting.

[45] I also note Ms. McGillivray's testimony, which I accept on this topic, that she met with the President prior to each of these meetings and provided the Board with a package of materials for their use at the meetings. While this is not equivalent to attendance at the meeting, I find that under the circumstances, Ms. McGillivray acted reasonably in choosing not to attend those two meetings. That is not to say that she or Progressive were excused from attending any meetings in the future, but I need not assess that, as notice of termination of the Management Agreement was given by the Corporation shortly thereafter.

[46] The other issues such as tardiness in the roof repairs, overly expensive caretaking or cleaning contracts, and other such issues, while not trivial, do not amount to just cause for immediate termination of this Contract for failure to perform, particularly in light of the commendation given to Progressive at the January 10, 2011, Annual General Meeting. The Management Contract did specify certain obligations regarding maintenance of the property by Progressive, such as cleaning and painting, maintenance and snow removal, but fundamental issues regarding major capital expenses, such as replacement of the roof, would be decisions wholly within the purview of the Board. That is confirmed by paragraph 11(a) of the Management Agreement as referred to earlier.

[47] The Defendant maintains that the roof was in bad shape, indeed so bad that Progressive ought to have attended to having it replaced instead of spending money having it fixed. Given the evidence that less than $2,500.00 in roof repairs were done prior to roof replacement, I do not find this to be such a significant example of failure to maintain the premises so as to warrant termination of the Management Agreement without notice. The Defendant also provided evidence that the Corporation had very limited funds, so it was not unreasonable for Progressive to minimize costs by having the roof repaired initially instead of incurring the major capital expense of replacing the roof. The Board could have instructed Progressive to proceed with replacement of the roof, or at least more detailed assessment of it, but it chose not to.

[48] Furthermore, just four months prior to the Notice of Termination of the Contract, the Board commended Progressive on an excellent job managing the building and keeping expenses down. Had the failure of Progressive to attend to replacement of the roof rather than repair been an issue at that time, no doubt the Board would have not given a commendation to Progressive, but rather would have directed alteration to the building as required by Paragraph 11(a) of the Management Agreement.

[49] Lastly, any delay in turning over reserve or operating funds after the termination cannot amount to grounds for a termination implemented some two or three months earlier. While events occurring prior to termination, but learned of afterwards, may be relied upon as grounds for termination, events that occurred after the termination cannot be relied upon. Such events may give rise to damages, but no such damages were proven.

[50] Therefore, I find that there was no just cause for the Corporation to terminate the Management Agreement without notice for breach of terms of that contract.

(ii) Was this a Developer's Agreement pursuant to Section 17 of the *Act*?

[51] The next issue to be addressed is whether this is a "developer's management agreement" within the meaning of Section 17 of the *Act*, and whether the Corporation was entitled to terminate the Management Agreement in accordance with that section.

[52] Section 17 of the *Act* states as follows:

> "17(1) In this section, "developer's management agreement" means a management agreement that was entered into by a corporation at a time when its board was comprised of persons who were elected to the board while the majority of units were owned by a developer.
>
> (2) Subject to subsection (3), a corporation may, notwithstanding anything contained in a developer's management agreement or a collateral agreement, terminate a developer's management agreement at any time after its board is comprised of persons who were elected to the board after the majority of the units were owned by persons other than a developer.
>
> (3) A developer's management agreement
>
> (a) may not be terminated under subsection (2) without cause until one year has elapsed from the day that the agreement was entered into, except when the agreement permits termination at an earlier date, and
>
> (b) may only be terminated under subsection (2) on the corporation giving 60 days' written notice to the other party to the agreement of its intention to terminate the agreement,
>
> and the corporation is not liable to the other party to the agreement by reason only of the agreement being terminated under this section."

[53] The Corporation entered, as Exhibit 52, three volumes of Certificates of Title for each unit in Royal Oak Towers. There was testimony at the trial that Mr. Kevyn Frederick and Mr. Najeb Ammache, or their corporations, were developers. However, the term "developer" in the *Act*, section 1(1)(j) is defined as follows:

> " 'developer' means a person who, alone or in conjunction with other persons, sells or offers for sale to the public units or proposed units that have not previously been sold to the public by means of an arm's length transaction"

[54] On the condominium plan registered when the Corporation came into existence, the "developer" was shown as 226882 Alberta Ltd., not Frederick, Ammache or their corporations. 226882 Alberta Ltd. sold its interest in the Condominium Building to Voipus Canada Ltd., who in turn nominated Royal Oak Tower Corp. to be the Transferee. That initial sale between 226882 Alberta Ltd., and Voipus Canada Ltd. was for valuable consideration, and, as mentioned earlier, was an arm's length transaction.

[55] The word "public" is not defined in the *Act*. If the legislature intended the term "public" to include only individuals who buy single condominium units, and exclude corporations that buy more than one unit, it would have so specified that. While it is true that Royal Oak Tower Corp. bought all the units and quickly sold individual units to a number of individual parties, that does not mean that the acquisition by Voipus Canada Ltd., or Royal Oak Tower Corp. was not a sale "to the public". Indeed the sale to Voipus Canada Ltd. and transfer to Royal Oak Tower Corp., would, in my view, amount to a previous sale to the public, thus excluding them from them from the definition of "developer" in the Act.

[56] Accordingly, I find that the Defendant Corporation did not properly terminate the Management Agreement effective July 31, 2011, and therefore, the Management Agreement was in effect until May 31, 2012. Progressive is entitled to damages for breach of that contract arising from the Defendant failing to honour it until May 31st, 2012.

[57] Other than the assertions that Frederick, Ammache or their corporations were developers, there was no evidence presented to show, on the balance of probabilities, that they sold or offered to sell any units that were not previously sold to the public by means of an arm's length transaction. In short, it has not been established on the balance of probabilities that Voipus, Royal Oak, Frederick or Ammache or their corporations were developers as defined in the *Condominium Property Act* and as required in section 17 of that *Act.*

[58] Furthermore, the intention of that section, in my view, is to ensure that a condominium board is not handcuffed with a management agreement entered into by a developer, and ultimately to provide the condominium board with an opportunity to review, assess and terminate that management contract on 60 days' notice if it sees fit to do so.

[59] Here, the Management Agreement entered into on June 1st, 2007, was renewable annually and could be terminated on 60 days' notice given prior to the annual renewal date of May 31st each year. This was not a long term Management Agreement which the Board was unable to terminate and with which they were stuck with unfavourable terms agreed to by the developer, but not the Board. The Board need not have renewed this contract, on proper notice, effective June 2008, June 2009, June 2010 or June 2011. They chose to permit renewal of this contract and thus, the continuation of this Management Agreement was a result of the Board's decision not to properly terminate it as they were entitled to do.

[60] Each renewal is a new and separate contract with the Board, whose members change from year to year. This was not a developer's Management Agreement "that was entered into by a corporation at a time when its board was comprised of persons who were elected to the Board while the majority of units were owned by a developer" as specified by section 17 of the *Act*.

The Agreement which the Defendant purported to terminate in this instance was an Agreement entered into effective June 1st, 2011, extending to May 31st, 2012. It was not an Agreement entered into June 1st, 2007 that continued until July 31, 2011.

(c) Damages

[61] No authorities were cited by either party with respect to an appropriate methodology for assessing damages for breach of the Management Agreement by the Defendant. The Plaintiff maintains that the damages for this breach of contract are a simple mathematical calculation of the amount which it would have been paid for the balance of the term of the Management Agreement, August 2011 to May 2012, at a rate of $1,775.00 per month, plus G.S.T., or $18,637.50.

[62] The Defendant made no submissions on this topic, other than taking the position that there was no breach of the Management Agreement and thus, nothing was payable.

[63] Of course, the general rule is that damages for breach of contract ought to place the wronged party in the position which they would have been in had the breach not occurred. Here, the Plaintiff would have received the amount of $18,637.50 for the balance of this contractual term. However, the Plaintiff would have incurred expenses in performing the Management Agreement and there was very little, if any, evidence presented on this topic, nor was there any significant cross-examination on the point. Furthermore, while the Defendant pled a failure to mitigate its damages on the part of Progressive, there was no evidence, cross examination or argument on the point presented by the Corporation.

[64] I am satisfied that the proper measure of damages suffered by Progressive in this matter is equal to the total contract price, less the direct costs associated with performing this contract. There was insufficient evidence and argument to suggest that indirect costs incurred such as rental charges, fuel or other overhead, should also be deducted. The profit margin of the entire business operation of the Plaintiff is not an appropriate factor to be considered. No specific cross-examination of the Plaintiff's witnesses was undertaken with respect to the direct costs that may have been incurred by Progressive in performing this contract for the remaining 10 months.

[65] In the end result, I conclude that I must do the best I can to estimate what direct expenses may have been incurred by Progressive in performing the Management Agreement. Given the nature of this contract, which delineates the services to be provided, and the involvement of Progressive in the day to day management of the Condominium Building, I assess the Plaintiff's expenses to be 25% of its total remuneration. Thus, its net profit on this contract would have been 75% of $1,775.00 (71 doors x $25.00 per door) per month, plus GST, for a total over the remaining 10 months of this contract of $13,978.12.

(d) Counterclaim

[66] For reasons specified previously, I have found that Progressive did not breach the Management Agreement with the Defendant. There was no evidence led to substantiate the remaining claims in the Counterclaim dealing with mismanagement of utilities, the garbage

chute or a failure to account for trust funds. Even if these causes of action had been established, no evidence was led as to the quantum of any losses that may have been incurred.

[67] As a result, the Counterclaim pursued by the Defendant fails.

CONCLUSION

[68] In conclusion, I find that the Plaintiff is entitled to Judgment in the amount of $13,978.12, plus interest at the rate as prescribed in the *Judgment Interest Act* c. J-1 RSA 2000, from June 1st, 2012 to the date of this Judgment. The Counterclaim of the Defendant Corporation is dismissed.

[69] Furthermore, the Plaintiff shall be entitled to costs, which may be spoken to if necessary.

Heard on the 4th day of November, 2013 and the 16th and 17th day of December, 2013 and the 28th day of February, 2014.

Dated at the City of Edmonton, Alberta this 4th day of April, 2014.

G.W. Sharek
A Judge of the Provincial Court of Alberta

Appearances:

Roberto Noce, Q.C. of Miller Thomson
for the Plaintiff

Marlene Glebe
for the Defendant