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Docket: CI 06-01-47709  
(Winnipeg Centre)

Indexed as: Olschewski v. 520 Portage Avenue Ltd. et al.  
Cited as: 2007 MBQB 226

**COURT OF QUEEN'S BENCH OF MANITOBA**

**BETWEEN:**

RICHARD E. OLSCHESKI, ) Counsel:  
 )  
 ) plaintiff, ) LINDSAY D. HYMAN  
 ) for the plaintiff  
- and - )  
 )  
520 PORTAGE AVENUE LTD. and ) THOMAS G. FROHLINGER  
HART MALLIN, ) and GARY M. SARCIDA  
 ) for the defendants  
defendants. )  
 )  
 ) JUDGMENT DELIVERED:  
 ) SEPTEMBER 6, 2007

**SUCHE J.**

[1] In March 2006, the plaintiff purchased unit 305 in the defendant 520 Portage Avenue Ltd., a condominium corporation. The possession date was July 1, 2006.

[2] Prior to making the offer to purchase, the plaintiff was given promotional material by the defendants stating the size of the unit was 1,824 square feet. However, in late April he was told by a Canada Mortgage and Housing

Corporation ("CMHC") appraiser who had just measured the unit, that it was considerably smaller than this. He hired a land surveyor, who concluded it was only 1,390 square feet. The plaintiff immediately brought this action seeking rescission of the agreement or, in the alternative, an abatement in the purchase price, as damages.

[3] Given the impending closing date, the parties agreed to an order whereby the purchase monies would be paid to the defendants' lawyer and held in trust until the action was resolved. A trial of the following issues was also agreed:

- (i) the abatement of purchase price, if any, shall be determined by subtracting the actual square footage of the condominium unit, from the square footage represented by the defendants (1823) [sic] and by multiplying the difference by the square footage price based on the offer to purchase;
- (ii) the method of calculating the actual square footage shall be determined by July 14, 2006, failing which the method will be determined by the court.

The parties were not able to agree on the methodology, so the issues to be determined are both the method of calculating the actual square footage and the actual square footage of unit 305.

[4] As it turns out, the question is much more difficult to answer than it would appear, in part because of the nature of the unit, but also because there are different approaches used by the real estate industry to determine size.

**FACTS**

[5] The building at 520 Portage Avenue was previously a racquet sports complex. In 2004 it was converted into a condominium with 19 units. Unit 305 is what is commonly known as a loft style, consisting of two levels. A partial second floor or mezzanine is open to the main floor.

[6] When the plaintiff viewed unit 305 in March 2006, the promotional material he was given showed the various features, price, condominium fees, and the "size" of the units for sale. Unit 305 was shown as having 1,824 square feet. The sheet was prepared by the Martin Real Estate Team.

[7] To put this issue in context, condominiums are governed by ***The Condominium Act***, C.C.S.M. c. C170 (the "***Act***"). To create a condominium, the owner of the land must file a declaration containing information required by the ***Act***, along with a plan prepared by a land surveyor which meets the following criteria:

**Contents of plan**

6(1) A plan shall delineate the perimeter of the horizontal surface of the land, and the perimeter of the buildings in relation thereto, and shall contain

- (a) structural plans of the buildings;
- (b) a specification of the boundaries of each unit by reference to the buildings;
- (c) diagrams showing the shape and dimensions of each unit and the approximate location of each unit in relation to the other units and the buildings;

[8] The declaration for 520 Portage Avenue Ltd., filed in the Winnipeg Land

Titles Office, includes the following:

1.03 Particulars of Units

The units shall be as shown in the Plan, which has been prepared in accordance with the provisions of the Act and is submitted for registration contemporaneously herewith.

The proportions expressed in the percentages allocated to each unit in which the owners are to have voting rights in the Corporation, to have common interests or shares in the common elements, and to contribute to the common expenses, shall be as follows:

<u>Unit No.</u>	<u>Percentage (%)</u>
	...
18	4.82
	...

2.01 Meaning of "Unit"

Wherever in any agreement respecting a unit, or in this Declaration, the By-Laws, the Common Element Rules, or any mortgage or conveyance of or any other instrument dealing with a unit, the term "unit" is used, it shall include for all purposes the interest in the common elements appurtenant to such unit unless a contrary intention is specifically stated.

2.02 Boundary of Unit

The boundaries of the units are shown on the Plan.

[9] The plan was prepared by Douglas Stevens, a Manitoba land surveyor.

The declaration filed with the plan describes the unit boundaries:

HORIZONTAL UNIT BOUNDARIES ARE DEFINED BY THE CENTRE LINE OF THE DIVIDING STUD WALLS BETWEEN UNITS, AND BY THE OUTER FACE OF PLASTERBOARD BETWEEN UNITS AND COMMON ELEMENTS, AND BY THE OUTER FACE OF THE BRICK, AND BY THE BOTTOM OF THE STEEL STRINGER, AND BY THE LIMITS OF ST. MARY AVENUE AND PORTAGE AVENUE.

VERTICAL UNIT BOUNDARIES ARE DEFINED BY THE BOTTOM OF THE STEEL JOISTS, AND BY THE BOTTOM OF THE WOOD JOISTS AND THEIR PROJECTION, AND BY THE TOP OF THE CONCRETE PAD, AND BY THE TOP OF THE STEEL JOISTS, AND BY THE BOTTOM OF THE STEEL STRINGER.

[10] The plan shows the boundaries of the units within the building. The balcony is not included but is an exclusive common element. Neither the square footage of the building nor the individual units is noted. In the case of the units with two levels, the open space on the second level is not shown. Mr. Stevens, who has extensive experience working on condominium projects, testified that he was not asked to measure the square footage, either as part of his assignment in preparing the plan or at anytime since.

[11] Stevens testified that in his experience there are two standard methods of measuring the unit boundaries in a condominium. The first is that which he employed, namely, the centre line of the dividing stud wall between the units and the outer face of the exterior wall. The other is to use the surface of the drywall and the inner face of exterior walls. The choice of methodology, generally, as well as in this instance, he said, was based on the direction received from the developer. Stevens was not asked how he would determine the actual square footage of a condominium generally, or in the case of unit 305, in terms of the treatment of the open space on the second floor. No evidence was presented as to why the defendants instructed Stevens to use these boundaries.

[12] Leslie McLaughlin, who measured unit 305 for the plaintiff in June 2006, is also an experienced Manitoba land surveyor and has worked on many

condominium projects. He testified that there are neither professional standards for Manitoba land surveyors nor definitions within the **Act** governing the determination of boundaries of the individual units in a condominium.

[13] Mr. McLaughlin said that he considers the role of the condominium plan is to separate the structural elements of the building from the individual units, which unit owners typically have the right to modify or alter. His objective in creating a plan, then, is to separate the structural elements and the air space, to make it clear where the unit owners' rights begin and end.

[14] In determining the horizontal boundaries, McLaughlin said his practice is to use the interior of the finished wall in all instances. This is the standard dictated by the **Condominium Property Act** of Alberta, the only jurisdiction that has legislated standards, and more accurately reflects the useable space in a condominium. He does not include balconies, nor does he include open areas in a loft condominium. He also testified that he saw no difference between the terms "actual square footage" and "actual living area", a term used in residential real estate sales.

[15] Several other condominium declarations were filed as exhibits during the trial, some of which used McLaughlin's methodology of interior drywall to drywall, while others used Stevens' method of exterior walls to midpoint of common walls.

[16] McLaughlin measured unit 305 to be 1,390 square feet. He agreed that if he calculated square footage based on the unit boundaries of unit 305 as shown

on the plan (that is, without deducting the open area on the second level), the total size was 1,698 square feet. If the balcony, which is not shown as part of the unit on the plan, was added, the total size was just less than 1,814 square feet.

[17] The size of a property is a matter of considerable interest to the real estate industry. Usually it is an important, and often the most important factor in establishing its value. In this case, the plaintiff's evidence was that the size of the unit was the essential factor in his decision to purchase unit 305.

[18] The Manitoba Real Estate Association (the "MREA"), the licencing body for realtors in Manitoba, publishes guidelines for its members to follow when measuring properties (the "Guidelines"). These are based on the *Real Estate Encyclopedia – Canadian Edition*, and are used in pre-licencing instruction to new realtors, and by the Winnipeg Real Estate Board (the "WREB") which operates the Multiple Listing Service (the "MLS"), a forum for information on properties listed for sale by realtors.

[19] "Actual Living Area" is a concept used in the Guidelines to describe the size of a residential property. In the case of detached homes, Actual Living Area is determined by the outside measurements of the building, sometimes with adjustments, depending on the configuration or construction of the building. In the case of duplexes and row housing, the centre line of any party wall is also utilized. The Guidelines specifically address the circumstance of a partial floor, mezzanine or open air space: in both diagrams and text, the point is made that

air space created by a mezzanine or loft is not to be calculated in determining the living area.

[20] As to condominiums, the Guidelines say:

#### **STANDARD MEASUREMENT OF CONDOMINIUMS**

The great boom in condominium development in Canada has created some confusion as to the proper method of measuring the size of the condominium. Developers, in order to increase the apparent size of the condominium, have in many cases included areas such as balconies, large patios and even parking stalls in the condominium measurements.

In general, it is preferable to define the condominium by reference to the walls of the building. Any outside areas which are for the private use of the owner of a condominium may be regulated and defined under Exclusive Use Agreements. These Agreements can provide for the exclusive use of a part of the Common Property by one condominium owner and are the most appropriate way of dealing with such areas as balconies, gardens, parking stalls, etc.

The condominium itself is most usually defined by the square area resulting from measurements taken from the centre line of the demising walls. In multi-level condominiums, the area of each floor would be added. This area should coincide with the square area of the condominium as represented in the Condominium Plan and, if confusion exists, the figures may be obtained from the Title Office.

In advertising or representations made by real estate practitioners about the size of condominiums, it is suggested that the square area of the condominium together with any exclusive use areas be set out in similar manner to the following example:

"Condominium of 112.59 m<sup>2</sup> together with exclusive use of balcony, large patio and 2 parking spaces."

Such a statement clearly defines for the buyer what is being offered and eliminates much of the confusion existing in measurement of condominiums.

[21] The following appears further on:

#### **CAUTION**

##### **Measuring a Condominium**

Practitioners contemplating condominium sales need to understand various guidelines about condominium measurements. The great boom



in condominium development over the past few decades has created certain difficulties as to the proper method of measuring the size of a condominium unit owing to different approaches taken. Sometimes, confusion can arise as to exactly what portion of the condominium property is defined as the unit and what may be, for example, an exclusive use common area (patio area, parking space, etc.) that may be for the use of that unit owner, but owned by the condominium corporation. A second point of confusion arises in determining the exact measurements of the unit itself. In order to know those measurements, the boundaries of the condominium unit must be identified. A definition of unit boundaries for a particular unit in a condominium project can be found in the Description for that project. As an example, the boundaries of a unit might be described as:

**Horizontal**

- The upper surface of the concrete floor slab.
- The under surface of the concrete ceiling.

**Vertical**

- The unit-side surface of the concrete and/or concrete block walls.
- The centre-line of concrete or concrete block or metal stud non-structural walls separating units from other units.
- The unfinished inner surface of window frames and exterior doors.
- The unit-side surface of any excluded walls or columns.

Obviously, anyone contemplating condominium sales as a specialty field must fully understand the procedures by which unit boundaries are established to provide accurate measurements and related information to buyers and sellers.

In this situation the information sheet prepared by the Martins Real Estate Team did not follow the suggestion in the Guidelines as to how to describe the "square area" and the exclusive use areas of the unit.

[22] Three licenced realtors testified during these proceedings. They had differing approaches to how unit 305 should be measured. All three maintained they were properly applying the Guidelines.

[23] Barbara Johnson is a realtor who is employed as the Manager of Member Services of the WREB. She did not measure unit 305 but testified how the WREB would expect a realtor to calculate the actual living area used for purposes of the

MLS, which, she said, is also the interpretation used by the MREA in its disciplinary proceedings. Realtors are expected to physically measure a property, and not simply rely on other realtors or plans, although plans should be consulted if uncertainty exists. Relevant to unit 305, she testified that neither the open space created by a mezzanine or partial floor nor balconies should be included in determining living area. Only floor space that can be walked on is included. Any area that is not heated or used on an all season basis, and in the case of a condominium, common elements with exclusive use to the unit holder, are not included, but should be referenced in the narrative of the listing information.

[24] Garry Loewen, a realtor whose practice includes residential condominiums, and Kenneth Clark, whose practice is almost exclusively residential condominiums, testified on behalf of the defendants. As it happens, Mr. Loewen is a personal friend of Mr. Mallin. This relationship makes him less than independent, which, of course, diminishes the value of his opinion.

[25] Eric Krueger is a professional appraiser, and a member of the Appraisal Institute of Canada (the "AIC"). Krueger was retained by CMHC to provide an appraisal of unit 305 for financing purposes. He measured the condominium to be approximately 1,500 square feet. The AIC uses the local real estate board's methodology for determining square footage, which in this instance is the MREA. Krueger agreed that balconies and air space should not be included in calculating square footage.

[26] Timothy Heelis was called by the defendants. He describes himself as a space planner who provides consulting services to the Winnipeg real estate community. He is not a realtor. For the last year or so, he has worked exclusively for one realtor, Bill Thiessen, who has listed five units in the defendant condominium corporation. He was involved in preparing listing materials and promotion documents for these units, but not unit 305. Mr. Heelis's main task is to measure properties to obtain information for use in the MLS forms. He was not aware that the WREB had published any guidelines for measuring condominiums. I did not find his evidence helpful. His ongoing business relationship with 520 Portage Avenue Ltd. diminished the value of his opinion, in any event.

### **ANALYSIS**

[27] Two issues arise from the various opinions on how to calculate the square footage of unit 305: how the boundaries of the unit should be determined, and whether the balcony and open space on the second level should be included.

[28] On the first matter, Mr. McLaughlin used the interior finish to interior finish measurements. Mr. Stevens used outside wall to mid point of common walls. Both are permissible in terms of the **Act**. Mr. Stevens' method, coincidentally or not, is the same as that used in the Guidelines.

[29] More contentious is the treatment of the balcony and the open space on the second level. The balcony is not included as part of the unit on the plan, and the open space is not referenced. Mr. McLaughlin maintained that neither should

be included. Ms. Johnson and Mr. Krueger testified that the Guidelines say that neither should be included. Only Mr. Clark advocated otherwise. He testified that some condominiums include balconies as part of the unit and some do not, instead identifying the balcony space for the exclusive use of the unit holder. He estimated that about 60% of the time balconies were included.

[30] Mr. Clark was of the view that in the case of unit 305, the balcony should be included in calculating the Actual Living Area, even though it was not included in the unit on the condominium plan. His reasoning was twofold: the condominium declaration provided that the unit owner retained responsibility for repair and maintenance of the balcony, and the nature of the space itself was such that it would be considered habitable space under the Manitoba Building Code. The area is equipped with sprinklers and electrical service, unlike most balconies, which are, in effect, attached to the outside of the building. Here it is actually recessed from the exterior wall. In its prior use, the outer edge of the balcony was the exterior wall of the building.

[31] As to the air space, Clark's view was that it, too, should be included in determining Actual Living Area. He relied on the following statement in the Guidelines:

The condominium itself is most usually defined by the square area resulting from measurements taken from the centre line of the demising walls. In multi-level condominiums, the area of each floor would be added. This area should coincide with the square area of the condominium as represented in the Condominium Plan and, if confusion exists, the figures may be obtained from the Title Office.

[32] Clark pointed out that the plan shows the boundaries of unit 305 without reference to the open air space. He said that even in instances where a mezzanine was indicated on the condominium plan, such as the Webbsite, another local condominium project with a mezzanine floor, he would use the outer boundaries of the second floor for purposes of determining Actual Living Area, provided that there was sufficient height in the open area to allow for the mezzanine/partial floor to be extended across the balance of the unit.

[33] Clark maintained that the direction in the Guidelines that air space should not be included related only to single residences. This suggestion was put to Johnson on her cross-examination, but she rejected it.

[34] Mr. Clark's reasoning for including the balcony in Actual Living Area has some basis in logic, given its unusual features. However, it is at odds with the WREB/MREA's direction, as stated in the Guidelines and confirmed by both Johnson and Krueger, that unheated areas are not included. It is also not included as part of the unit on the plan.

[35] Mr. Clark's position that the open air space should be treated the same as existing floor space is not, in my view, at all persuasive. I fail to see how, by any logical analysis, it can be said that the *potential* to add floor space equates to actual space.

[36] Admittedly, the Guidelines are not clear on this point. Read in isolation, one could see how the passage referred to by Clark could be interpreted to mean that the unit boundaries as shown on the condominium plan are to be used even

where open space exists. However, when read in the context of the Guidelines as a whole, this is not a reasonable interpretation. There is no reason that open spaces should be included in the Actual Living Area of a condominium, as they are not included in a house, duplex or row housing. BOMA guidelines, the standard for commercial properties, also require that open spaces not be included.

[37] So, despite Mr. Clark's extensive knowledge and experience in the sale of condominiums and real estate generally, I much prefer the position taken by Ms. Johnson and Mr. Krueger on this point. It is consistent with both logic and the Guidelines.

[38] The discussion of Actual Living Area is a bit of a digression, in that what needs to be determined is the actual square footage. Are they the same thing? Mr. McLaughlin's view was that they were. Mr. Clark testified that "unit size" and Actual Living Area are rarely the same thing, even though he seemed to be advocating the same interpretation for both. Throughout the trial, "size", "square footage", "unit size", and "living area" were used by different witnesses, and sometimes by the same witness, often interchangeably. The information sheet prepared by the Martin Real Estate Team refers to "size". All of this just reinforces the observation in the Guidelines that there is considerable confusion in this area.

[39] Be that as it may, the parties identified the issue to be resolved is the actual square footage of unit 305. The plaintiff argues that I should accept

Mr. McLaughlin's opinion on the matter of the unit boundaries, as well as treatment of the balcony and air space. He is a Manitoba land surveyor, a profession that has the statutory mandate to measure land and the boundaries of same. The realtors who testified agreed that they would defer to a surveyor on the matter of how to measure. While Mr. Stevens is also a Manitoba land surveyor, he did not offer an opinion on how actual square footage should be determined, which in itself has an evidentiary consequence, namely, that an adverse inference should be drawn. The plaintiff says Mr. Clark's opinion that both open space and the balcony should be included, which results in the measurement closest to that represented to the plaintiff by the defendants' realtor, is not consistent with the plans prepared by Stevens, the Guidelines, or practice in the real estate industry.

[40] The defendants argue that the actual square footage is different than the Actual Living Area and should include both what is owned by the unit holder and anything that he is responsible to maintain. They point to the fact that article 2.05 of the by-laws of 520 Portage Avenue requires the unit holder to maintain any adjacent balcony, whether the balcony is an exclusive common element or part of the unit. In addition, they say the balcony is within the perimeter of the building, rather than protruding.

[41] In the end, there are almost as many reasons to accept or reject the various ways of calculating the actual square footage of unit 305 as there are

arguments. The question is not a matter of absolute truth but one of definition, and there is no universal standard. This is not easily changed, but the confusion could be greatly reduced if the **Act** specified how unit boundaries in a condominium are to be determined, and the Guidelines were clearer about determining the Actual Living Area of a condominium. These are problems that have to be solved elsewhere, and they should be.

[42] In the meantime, in deciding the actual square footage of unit 305, I do think the context in which the question is being asked is a relevant consideration. This dispute arises in the course of a sale of the property by a realtor. In addition, the fact that the Plan defines the unit boundaries in a way that is permitted by the **Act** and is not contrary to any standard of the land surveyors' profession, are reasons to use those boundaries. What is the best or preferable practice, as suggested by Mr. McLaughlin, is less significant, than if one were asking the question before the condominium had been designed or created.

[43] So while I agree with the plaintiff that generally, when it comes to measuring, Mr. McLaughlin's expertise is deserving of more deference than the other non-surveyors, on this issue I must keep in mind that he used different unit boundaries than were used in the plan. The unit boundaries in the plan are also those used to determine Actual Living Area. In context, it seems to me that



together these facts suggest that the unit boundaries defined in the plan are the most appropriate.

[44] On the issue of the balcony and air space, I accept Mr. McLaughlin's view that these should not be included. This is reinforced by the fact that the Guidelines use the same approach.

[45] All of this leads me to conclude that the actual square footage of unit 305 is to be determined by the unit boundaries on the plan, less the open space on the second level.

[46] This appears to be the methodology used by Mr. Krueger, who measured the unit to be "approximately" 1,500 square feet. Several of the witnesses, testified that where a space, whether a condominium unit or a building, has numerous or unusual angles, determining the exact size can be extremely difficult. This appears to be the reason Mr. Krueger decided to use an approximation. Based on the evidence, however, this is as precise an answer as I can give.

[47] Having determined that the actual square footage is 1,500, I leave it to counsel to calculate the amount of the abatement of the purchase price, using the formula identified in the order of June 30, 2006. If they are unable to agree, a further appearance can be scheduled before me.

[48] The parties may also speak to costs if they are unable to agree.

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J.

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