COURT OF APPEAL FOR ONTARIO

CITATION: Simcoe Vacant Land Condominium Corporation No. 272 v. Blue Shores Developments Ltd., 2015 ONCA 378
DATE: 20150527
DOCKET: C58302

MacFarland, LaForme and Lauwers JJ.A.

BETWEEN

Simcoe Vacant Land Condominium Corporation No. 272,
Simcoe Vacant Land Condominium Corporation No. 299,
Simcoe Vacant Land Condominium Corporation No. 312 and
Simcoe Vacant Land Condominium Corporation No. 321

Applicants (Appellants)

and

Blue Shores Developments Ltd. and
Duca Financial Services Credit Union Ltd.

Respondents (Respondents)

Jonathan H. Fine and Benjamin J. Rutherford, for the appellants

Stephen Schwartz, for the respondent, Blue Shores Developments Ltd.

Reeva Finkel, for the respondent, Duca Financial Services Credit Union Ltd.

Heard: October 7, 2014

On appeal from the order of Justice Edward M. Morgan of the Superior Court of Justice, dated January 9, 2014, reported at 2014 ONSC 187.

Lauwers J.A. (dissenting in part):

A. INTRODUCTION

[1] The appellants are four condominium corporations. They are part of a large project that comprises about 200 dwelling units, some recreational facilities including a marina, and a Clubhouse, located on the shores of Georgian Bay near Collingwood, Ontario. The respondent, Blue Shores Developments Ltd., developed the project.

[2] The dispute between the appellants and Blue Shores relates to the ownership and control of the Clubhouse, which Blue Shores has owned and operated it from the outset.

[3] The appellants applied for a declaration that they own the Clubhouse, and that the mortgage over it granted by Blue Shores to the respondent, Duca Financial Services Credit Union Ltd., is void or subordinate to their interests. The application judge dismissed their application He also dismissed their request for an accounting of Clubhouse expenses and revenues, and their claims that Blue Shores was liable for oppression under s.135 of the *Condominium Act, 1998*, S.O. 1998, c. 19.

[4] For the reasons that follow, I conclude that the appellants have an equitable interest in the Clubhouse based on an executory contract between Blue Shores and the appellants. This executory contract compels Blue Shores to

transfer ownership of the Clubhouse to the appellants after Blue Shores no longer owns any lands within the project. Although I would set aside the application judge's contrary holding, I do not accept the appellants' argument that their equitable interest in the Clubhouse precluded Blue Shores from placing a mortgage on the Clubhouse. I also would reject the appellants' arguments that the mortgage is void, that Blue Shores is required to operate the Clubhouse on a non-profit basis, and that Blue Shores' conduct has been oppressive towards them.

B. FACTUAL OVERVIEW

[5] Blue Shores is the developer of this lakeside condominium project. The development is governed by five condominium corporations, including the four appellants. The fifth condominium corporation governs only the marina and vacant undeveloped lands and is not a party to this appeal. The dispute centres on the ownership and operation of the Clubhouse.

[6] The disclosure statements that Blue Shores gave to purchasers of the condominium units, under s. 72 of the *Condominium Act,* provided for the conveyance of the Clubhouse to the appellants within 120 days after the date that Blue Shores is no longer registered owner of any lands within the project (the "conveyance obligation").

[7] The Easement and Cost Sharing Agreement (the "EACSA") between the appellants and Blue Shores provides that so long as Blue Shores owns and operates the Clubhouse, each condominium unit owner is required to pay a monthly Clubhouse membership fee to the condominium corporation in which the unit is located; the corporation in turn is required to remit the aggregate of these fees to Blue Shores. Blue Shores has used these payments for its own purposes and refuses to provide an accounting to the appellants.

[8] Since Blue Shores had not yet sold all of the vacant units or the lands within the project, the conveyance obligation had not been triggered. As a result, Blue Shores continues to own and operate the Clubhouse.

[9] In November 2009, Blue Shores granted a mortgage to Duca in the amount of $1 million, which Duca registered against title to the Clubhouse. The mortgage was renewed in November 2011.

[10] In April 2012, after the registration and renewal of the Duca mortgage, the appellants registered a notice of an unregistered estate, right, interest or equity against title to the Clubhouse under s. 71 of the *Land Titles Act*, R.S.O. 1990, c. L.5. With this registered instrument, the appellants gave public notice that they claim a property right in the title to the Clubhouse.

[11] In August 2012, the appellants brought an application for a declaration of ownership over the Clubhouse. Their application was dismissed and they now appeal.

C. ANALYSIS

[12] This appeal raises the following issues:

1. Do the appellants have an equitable or inchoate interest in the Clubhouse?
2. Did Blue Shores have the right to mortgage the Clubhouse to Duca?
3. Is Duca's mortgage subordinate to or void against the appellants' interest in the Clubhouse?
4. Are the appellants entitled to an order that Blue Shores take steps to convert the Clubhouse from a freehold interest to a unit within a condominium corporation?
5. Is Blue Shores required to operate the Clubhouse on a non-profit basis and account to the appellants?
6. Does the limitation period is s. 113 of the *Condominium Act* bar the appellants' claim?
7. Does Blue Shores' conduct constitute oppression under s. 135 of the *Condominium Act*?

I address each issue in turn.

(1) Do the appellants have an equitable or inchoate interest in the Clubhouse?

[13] The appellants argue that they have an equitable interest in the Clubhouse, which entitles them to the relief they seek.

(a) The Application Judge's Decision

[14] The application judge explained his understanding of the role of the Clubhouse in the development, at para 8:

> The Disclosure Statements make it clear that Blue Shores kept for itself the ownership of the Clubhouse until all of its interest in the balance of the project and abutting property was sold. The reason for this has always been obvious to all concerned: the Clubhouse, with its social, athletic, and other recreational facilities, is an essential amenity in the marketing of the project. Ensuring that it was properly operated and maintained until the last of Blue Shore's property is sold is important to Blue Shores as developer of the entire project.

[15] The standard form purchase agreement for each condominium unit provided that the purchaser took title "subject to the Condominium Documents". The application judge found, at paras. 20-21, that this phrase could not be read as incorporating the disclosure statements into each purchase agreement, so as to give each purchaser some form of legal or equitable interest in the Clubhouse.

[16] The application judge found that the appellants do not have an equitable interest in the Clubhouse. He rejected their characterization of the conveyance obligation in the disclosure statements as an "executory contract" for the purchase of the Clubhouse that gave them an equitable interest in it. In his view, the disclosure statements, and the conveyance obligation in particular, were not clearly written as existing and paid-for contracts for the purchase and sale of property, as he asserted was required by s. 1(1) of the *Statute of Frauds*, R.S.O. 1990, c. S.19.

[17] Rather, the application judge found, at paras. 20-23, that the disclosure statements "specifically provide[] that an interest in the Clubhouse is *not* being conveyed with each sale." In his view, the incorporation of the disclosure statements into the agreement of purchase and sale of each unit "confirms that each of those agreements excludes the purchase and sale of the Clubhouse."

[18] The application judge noted, at para. 24, that the standard form purchase agreement for each condominium unit did not allocate any portion of the purchase price to the Clubhouse and did not convey an interest in the Clubhouse to the appellant condominium corporations as consideration for the unit purchasers' payments.

[19] Instead, the application judge found, at para. 25, that the conveyance obligation imposed a future requirement that the appellants and Blue Shores enter into an agreement for the purchase and sale of the Clubhouse once Blue Shores sold the remaining properties. The appellants would only get a legal or equitable interest in the Clubhouse upon the completion of this future agreement. Although Blue Shores has a future obligation to convey the Clubhouse, the application judge found, at para. 41, that it was entitled to retain ownership of the Clubhouse until it sold the remaining properties.

[20] While the application judge acknowledged, at para. 32, that Blue Shores had a statutory obligation under s. 78(1) of the *Condominium Act* to "take all

reasonable steps to sell the other residential units … without delay", he found, at para. 41, that the appellants had not proven Blue Shores had breached this obligation.

[21] According to the line of cases flowing from *York Condominium No. 167 v. Newrey Holdings Inc*. (1981), 32 O.R. (2d) 458, [1981] O.J. No. 2965, (Ont. C.A.), discussed in detail below, condominium developers hold the common elements and fixtures in trust for condominium corporations, such that the corporations have an equitable interest in those elements. However, the application judge, at para. 30, distinguished the situation before him from *Newrey* on the basis that the Clubhouse was not a fixture or a common element and, therefore, found, at para. 3, that Blue Shores did not hold the Clubhouse in trust for the appellants.

[22] In the application judge's view, expressed at para. 30, if the Clubhouse were a common element, each purchaser would have obtained an interest in the Clubhouse with the purchase of his or her condominium unit, which the standard form purchase agreement and the conveyance obligation in the disclosure statements made clear did not occur. He found, at para. 31, that classifying the Clubhouse as a common element would render meaningless and unnecessary Blue Shores' future conveyance obligation in the disclosure statements to transfer title to the Clubhouse, which could not have been the intention of the parties.

(b) The Positions of the Parties

[23] The appellants submit that the unit owners paid for an interest in the Clubhouse when they purchased their units. As a result, the conveyance obligation in the disclosure statements functions as an executory contract of purchase and sale, which gives the appellants an equitable interest in the Clubhouse. Alternatively, they argue they have an inchoate interest in the Clubhouse, that is, a "proprietary interest that has not as yet vested". The appellants submit the *Newrey* line of cases supports their claims, contrary to the application judge's interpretation.

[24] Blue Shores argues that even if the conveyance obligation were an executory contract of purchase and sale, the transfer date has not yet arisen; the appellants do not, therefore, presently have an equitable or inchoate interest in the Clubhouse.

[25] Blue Shores and Duca together argue the application judge correctly distinguished the *Newrey* line of cases on the basis that, even though the Clubhouse is subject to a future conveyance obligation, it is not a common element or asset in which the unit owners obtained an equitable interest along with the purchase of their units.

[26] Before attending to the analysis of this issue, I describe the relevant condominium documents.

(c) The Condominium Documentation

[27] As the evolving language shows, the condominium documentary edifice in this case was a work in progress; all the documents must be read together to understand their full meaning.

[28] The standard form purchase agreement provides that the purchaser accepts title to the unit subject to the "Condominium Documents", defined to include the disclosure statements. The documents evolved somewhat over the four phases of the project as build-out progressed. In the disclosure statement for the first condominium, for example, the Clubhouse was described as something that the Declarant Blue Shores "intends to develop". The disclosure statement for the fourth condominium stated simply that the "Declarant has developed a clubhouse".

[29] Blue Shores' obligation to convey the Clubhouse to the appellants is found in a paragraph in article 4.4 of the phase I disclosure statement, in article 4.3 of the phase II and phase III disclosure statements, and in article 4.2 of the phase IV disclosure statement. Although its language evolved somewhat, the conveyance obligation in the phase IV disclosure statement is materially the same as that found in the three previous disclosure statements, and provides:

> Ownership of the Clubhouse Facilities unit shall ultimately be transferred to the Phased Condominiums [each according to their ownership as tenants-in-common] by the Declarant (or any successor or

> assignee thereof for total consideration of Two dollars ($2.00). Such conveyance shall occur within one hundred and twenty (120) days following the date that the Declarant (or any successor or assignee thereof) is no longer the registered owner of any lands within the Project (including the Phased Condominiums and/or the Future Development Lands) or such earlier time as the Declarant may determine in its sole and unfettered discretion (the "Clubhouse Transfer Date").

[30] Blue Shores' declarations under the *Condominium Act* for each phase refer to a Cost Sharing Agreement that each new condominium corporation must enter into with respect to "Shared Facilities and clubhouse facilities".

[31] It is common ground that the "Cost Sharing Agreement" referred to in the disclosure statements is the EACSA, dated August 28, 2003. The EACSA recitals note that: "[t]he Declarant intends, but is under no obligation to construct the Clubhouse Facilities within the Future Phase Lands and to register the Clubhouse Facilities as a unit within the Future Phase Corporations." (This recital was overtaken by the construction of the Clubhouse.) The EACSA is intended to cover shared costs for shared facilities and to allocate the costs among the condominium corporations, both while Blue Shores, as the Declarant, is on the scene and after it has departed.

[32] The declarations also refer to the "Clubhouse Transfer Date". Despite the provision in the declarations that the "Clubhouse Transfer Date" would be defined in the "Cost Sharing Agreement", it is not found in the EACSA, but only in the disclosure statements.

[33] The shared facilities include the Clubhouse, but "subject to art. 5.00". Article 5.00 governs the ownership and use of the Clubhouse facilities by Blue Shores as the Declarant, and substantiates the application judge's view that Blue Shores retained ownership and control over the Clubhouse as "an essential amenity in the marketing of the project." Article 5.01 provides:

> The Clubhouse Facilities shall be registered as one recreational unit by the Declarant to be located within the Future Phase Condominium and the Declarant shall continue to own the Clubhouse Facilities for its use and for the use and enjoyment of residents and their guests of the Condominium Corporations, and/or, on a user fee basis (or as otherwise determined by the Declarant in its sole discretion) any other members of the public. Accordingly, the Declarant, its sales staff, agents employees and invitees, shall have a continued right of access to inspect and view the Clubhouse Facilities, and to use, without fee or charge, any portion of the Clubhouse Facilities, as part of its marketing/sales program, as a sales/rental/administrative office, and for advertising, signage and displays. The Declarant shall not be charged for the use of such space nor any utility service supplied thereto, nor shall the Condominium Corporations prevent or interfere with the Declarant's right of access to use and operate the Clubhouse Facilities in the manner aforesaid. The Declarant shall have the exclusive right to establish reasonable hours of use and permitted uses of the Clubhouse Facilities.

Discussion

[34] Justice Wilson remarked prophetically in the early days of condominium law: "There is no doubt that special problems arise out of the peculiar character of ownership in condominium project": *Newrey*, at para. 16. The barrage of cases

under the *Condominium Act* confirms the perduring accuracy of her remark. She identified the court's task as reconciling the ordinary law of contract and real property with condominium law.

[35] In undertaking that task in this appeal, I conclude that the appellant condominium corporations have an equitable interest in the Clubhouse, notice of which is capable of being registered under s. 71 of the *Land Titles Act*. I reach this result by application of the principles of contract law and real estate law in the statutory and regulatory context governing condominiums. Although the appellants argue forcefully that the *Newrey* line of cases also compels this result, I do not agree.

(i) The conveyance obligation in the disclosure statement is an executory contract

[36] Stepping back, I note that the Clubhouse is to be conveyed to the appellants for the nominal consideration of $2.00; while it may be true, as the application judge noted, that the standard form purchase agreement did not expressly allocate any portion of a unit's purchase price to the Clubhouse, the revenue generated by the sale of the units must have funded its construction and eventual conveyance, since there is no other available source of funds for those purposes.

[37] In my view, with respect to the conveyance of the Clubhouse, the essential terms of an agreement for purchase of land – the parties, the properties, the

price and the date of conveyance – are all clearly set out in the conveyance obligation in the disclosure statements: *McKenzie v. Walsh* (1920), 61 S.C.R. 312, at para. 1. No contractual element is missing. This was not in any sense a mere agreement to agree; there is no need for a new contract to be negotiated on, or immediately before, the Clubhouse Transfer Date, as the application judge suggested at para. 25.

[38] Therefore, the conveyance obligation is a valid contract. Specifically, it is an executory contract because "one or other of the parties [has] not fully performed its obligations": Angela Swan & Jakub Adamski, *Canadian Contract Law*, 3d ed. (Markham: LexisNexis Canada, 2012), at para. 8.164. As Kevin P. McGuinness explains in *Halsbury's Laws of Canada*, "Guarantee and Indemnity" (Markham: LexisNexis Canada, 2014 Reissue), at para. HGI-21 "Guarantees as Executory Contracts":

> An executed contract is one under which one party has fully performed its obligations (the most obvious example being in the case of a sales contract, where the buyer pays the full purchase price). In contrast, an executory contract is one that requires further performance by both of the parties (although either or both may have already completed part of their performance obligations under the contract).

[39] Two decisions from this court support the proposition that condominium documents can be enforceable contracts that may give rise to obligations to convey property in the condominium context. First, in *Peel Condominium Corp.*

No. 417 v. Tedley Homes Ltd. (1997), 35 O.R. (3d) 257, [1997] O.J. No. 3541, at para. 3, the condominium declaration and the disclosure statements both provided that the condominium corporation was under a "duty and obligation" to purchase a superintendent's unit and two guest units in each of the two buildings pursuant to the terms of the “conveyance and purchase agreement”, which was attached to the statements in draft form. The court framed the issue, at para. 17, as, “whether the [condominium] corporation can be required by means of a provision in the declaration to purchase such units”. The court concluded, at para. 16, that obliging the condominium corporation to purchase the units from the Declarant was “consistent with [the corporation's] objects”, as required by s. 3(3), now s. 7(4)(d), of the *Condominium Act*.

[40] While that section of the Act is not at issue in this case, *Tedley* demonstrates that a disclosure statement and declaration can impose an enforceable obligation on a condominium corporation to purchase property, and, therefore, a reciprocal obligation on the Declarant to convey it. The court made this clear at para. 21:

> I would not think it open to the elected directors after closing to effectively amend the declaration by refusing to complete a transaction that had been accepted by all of the owners, including the directors themselves … [I]n completing the agreement the first directors were acting in compliance with a *contract* the terms of which had been approved by the unit owners. [Emphasis added.]

[41] The documentary package in *Tedley* appears to have been more complete and consistent than the package in this case. The terms of the sale in *Tedley* were found in an attached purchase agreement rather than only in the provisions of the disclosure statement, as in this case. Further, the purchase agreement in *Tedley* had terms a good deal more elaborate than the simple conveyance terms in this case: it identified the units to be purchased by the condominium corporation, their full prices, the financing terms, and so on. However, I do not consider the absence of a similar purchase agreement to be fatal to this case, nor a good reason to distinguish between *Tedley* and this appeal, because the essential contractual elements are all set out in the conveyance obligation.

[42] In the second decision, *Peel Condominium Corp. No. 505 v. Cam-Valley Homes Ltd*. (2001), 53 O.R. (3d) 1, the disclosure statements provided for the potential construction of an outdoor recreational area ("ORA"). The Declarant reserved the right not to move forward with the ORA, and retained title to the lands pending development. However, the statements also provided that if the ORA were developed, it would be conveyed to the condominium corporations. After the Declarant decided not to construct the ORA, the corporations sought a declaration that they were the beneficial owners of the ORA lands.

[43] The court affirmed the trial judge's conclusion that if the Declarant had completed the ORA, it would have been required to convey it to the condominium corporations. At para. 14 of *Cam-Valley Homes*, the court characterized the

disclosure documents as setting out the developer's "obligations" with respect to the ORA lands. More specifically, at paras. 30-31, the court stated that the Declarant would have had an "*affirmative obligation* to convey the ORA Lands" (emphasis added) if they had been developed. This is precisely Blue Shores' situation, since it did build the Clubhouse.

[44] I conclude that the conveyance obligation in the disclosure statements contains the requisite elements of a valid executory contract of purchase and sale for real property – the Clubhouse – between Blue Shores and the appellants. The compliance of the contractual package as a whole with the *Statute of Frauds* is manifest; the motion judge's conclusion to the contrary, at para.19, was, with respect, wrong in law.

[45] I now turn to the principles of real estate law.

(ii) The principles of real estate law give rise to an equitable interest

[46] The common law has long recognized that a valid contract for the purchase and sale of land gives rise to a trust relationship, with the purchaser acquiring a beneficial interest in the property: Jessel M.R. summarized this principle in *Lysaght v. Edwards* (1876), 2 Ch. D. 499 at p. 506:

> [I]t appears to me that the effect of a contract for sale has been settled for more than two centuries … [T]he moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser…

See also Anne Warner La Forest, *Anger and Honsberger Law of Real Property*, 3d ed., loose-leaf (Toronto: Canada Law Book, 2014), ch. 11 at p. 52; Anthony Duggan, "Constructive Trusts from a Law and Economics Perspective" (2005) 55 U.T.L.J. 217, at p. 218.

[47] The trust relationship, known as “equitable conversion”, has been described as “[p]ossibly the oldest, and certainly the most frequent, use of the constructive trust”: Robert Chambers, "Constructive Trusts in Canada" (1999) 37 Alta. L. Rev. 173, at p. 186.

[48] This court described the qualified nature of the trust that arises from an agreement of purchase and sale in *Buchanan v. Oliver Plumbing & Heating Ltd*., [1959] O.R. 238 at pp. 242 and 244 (C.A.):

> The relationship created by such a contract does not entail all the obligations of an ordinary trusteeship. The vendor is not a mere dormant trustee; he is a trustee having a personal and substantial interest in the property, a right to protect, and an active right to assert that interest if anything is done in derogation of it …
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> ***
>
> [T]he trusteeship is not from the beginning an absolute one, for it is recognized that the vendor has a personal and substantial interest in the property which he is bound to protect.

[49] This principle also applies to condominiums, as Finlayson J.A. observed in *Peel Condominium Corp. No. 505 v. Cam-Valley Homes Ltd.* (2001), 53 O.R. (3d) 1, at para 43:

> The developer does not hold the condominium property in trust for the purchaser of the unit, it holds the title to the unit in trust for the prospective purchaser who has executed an agreement of purchase and sale to purchase a unit. The developer's good faith obligation, or duty, is to carry out the terms of the agreement and deliver whatever title the contract between the parties calls for. This obligation or duty is circumscribed by the documentation required by the Condominium Act. *The purchaser, for his or her part, has an equitable interest in the unit by virtue of the agreement that is signed*; an equitable interest that equity will enforce by specific performance. However, there is no overarching fiduciary duty arising out of the relationship of a vendor and purchaser as such. [Emphasis added.]

Disposition of the Issue

[50] Since the conveyance obligation in the disclosure statements is a valid executory contract for the conveyance of the Clubhouse by Blue Shores to the appellants, I conclude that the principles of contract law and real estate law operate to give the appellants an equitable interest in the Clubhouse. The corollary is that ss. 71 and 71(1.1) of the *Land Titles Act* apply and permit the appellants to register a notice of an unregistered interest in respect of the Clubhouse conveyance obligation. Therefore, the application judge was wrong in finding, at paras. 104-109, that the appellants were not entitled to register the notice on the Clubhouse title and in ordering its discharge. To be clear, it is the appellants who have the equitable interest, not the unit owners. However, this does not give the appellants the remedy they seek, as I note below.

[51] Given the central role that the Clubhouse plays physically and socially in this project, and, more specifically, played in its design and marketing by Blue Shores, I do not think that damages would be an adequate remedy. See *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415. It would be unconscionable, in equity's sense of the term, if Blue Shores were to take an action that would frustrate the conveyance obligation, such as by selling the Clubhouse to a third party. In my view, equity should intervene to prevent that possibility. That is the purpose of my proposed disposition.

[52] I do not rely on *Newrey* to reach this conclusion, for the following reasons.

(iii) The *Newrey* Line of Cases does not assist the Appellants

[53] My conclusion that the appellants have an equitable interest in the Clubhouse is based on the executory contract for its purchase and sale. I reject the appellant's argument that their equitable interest arises from the *Newrey* line of cases. As I explain below, the principle in these cases applies only to common elements and fixtures. The Clubhouse is neither.

[54] The application judge was correct in noting that the Clubhouse is not a common element, nor is it intended to become one. Article 5.01 of the EACSA and the disclosure statements related to two of the appellants provide that Blue Shores is to register the Clubhouse as a condominium unit in one of the appellants. Blue Shores has not yet done so and instead continues to hold it in

freehold ownership. Once the Clubhouse is conveyed, it will be owned proportionately by the appellants and will become an asset, but not a common element.

[55] As will be seen from the following discussion, the application of *Newrey* is presently confined to common elements and fixtures, consistent with the *Condominium Act.* The appellants urge this court to enlarge the reach of *Newrey* so that it applies not only to common elements and fixtures, but also to assets like the Clubhouse. This requires the court to confront the principle set in a number of cases that, while the court, as in *Newrey*, will enforce statutory obligations related to condominiums, it will otherwise give effect to the language of the condominium documents.

[56] I begin with a discussion of the *Newrey* principle and the cases that have followed it, followed by a discussion of the cases that limit *Newrey's* reach to common elements and fixtures.

The Principle in *Newrey*

[57] The root principle in *Newrey* set out by Wilson J.A. at para. 15:

> It seems to me that as soon as a unit purchaser enters into an agreement of purchase and sale of a unit he becomes the equitable owner of the unit and the interests appurtenant thereto even although the agreement cannot be closed until registration of the declaration.

In her view, noted at para. 17, "the parties have incorporated into their agreements by reference the provisions of the Act and declaration."

[58] The dispute in *Newrey* was about whether the janitor's suite, to which the developer had retained title, was properly a common element that belonged to the condominium corporation. The court there followed the result of a similar dispute in *Frontenac Condominium Corporation No. 1 v. Joe Macciocchi & Sons Ltd*. (1975), 11 O.R. (2d) 649, in which the developer was required to convey the suite to the condominium corporation at no cost.

[59] Justice Wilson found that once the declarant has embarked upon the sale of units, even before registration, the policy orientation of the *Condominium Act* comes into play. She said:

> I do not think the position of the owner-developer remains unchanged after he starts to sell units. I think that at that point he has committed the character of the project to that of condominium under the Act and declaration. I think he has also placed himself in a fiduciary relationship to the unit purchasers not only with respect to their units but also with respect to the interests appurtenant thereto. He therefore holds the property in trust for the unit purchasers, present and prospective, and for the condominium corporation which will come into being upon registration of the declaration. I believe he is under a duty to protect the interests of all unit owners, present and prospective, and cannot put his own interests in conflict with theirs even although he himself continues to be an owner as long as any units remain unsold.

[60] *Newrey* was invoked in *Middlesex Condominium Corporation No. 67 v. 600 Talbot Street, London Ltd*. [1998] O.J. No. 450, 37 O.R. (3d) 22, which also concerned the conveyance of a Superintendent's suite. The principle in *Newrey* was affirmed at para. 39, where Rosenberg J.A. said:

> To summarize, *Frontenac* and *Newrey Holdings* stand for the proposition that *with respect to the common elements*, the declarant is bound not to prefer its interests over those of the group of unit owners. Where the reasonable interpretation of the evidence is that, notwithstanding the registered title, the declarant intended a reasonable purchaser to believe or to justifiably assume that the superintendent's suite was a common element or an asset of the corporation, the declarant will be required to convey the unit to the corporation. If this constituted a departure from established contract and real property law, it was a departure required by the exigencies of condominium ownership.

[61] He concluded at para. 41:

> To protect both the purchaser and the declarant the test surely must be an objective one. If the declarant caused the purchasers to assume that the superintendent's suite was a common element, and if a reasonable purchaser would make such an assumption, a matter of interpreting the disclosure documents, this is sufficient to overcome the registered title.

[62] This court reached a similar conclusion in *Metropolitan Toronto Condominium Corp. No. 1250 v. Mastercraft Group Inc*. 2009, ONCA 584, where the issue concerned the developer's attempt to hive off the HVAC equipment and lease it back to the condominium. The court found that it was part of the common

elements. The principle in *Newrey* was recited at para. 37, and applied at paras. 38-41.

Newrey does not limit contractual rights beyond common elements and fixtures

[63] As noted earlier, any extension of Newrey beyond common elements and fixtures would require the court to confront the principle set out in a number of cases that, while the court will enforce statutory obligations applicable to condominiums, it will otherwise give effect to the language of the documents.

[64] In *Tedley* the court compelled the condominium corporation to purchase a superintendent's unit and two guest units in each of the two buildings, as required by the condominium documents.

[65] In *Cam-Valley Homes*, this court held that the developer's good faith obligation to carry out the purchase agreement was circumscribed by the documentation required by the *Condominium Act*. There was no overarching fiduciary duty arising out of the relationship of the vendor and purchaser to prevent the developer from constructing townhouses on project land originally intended for recreational facilities, since the agreement of purchase and sale indicated clearly that the recreational facilities might not be built and contained the purchaser's acknowledgment that the vendor may construct another building on the land. Finlayson J.A noted, at para 38:

> However, to the extent that Wilson J.A.'s statement can be read along with her earlier statements in *Newrey* to

> hold that the developer is in a fiduciary relationship with prospective unit holders, this position is unsupported by the general law and is contradicted by recent decisions…

[66] Similarly, in *Toronto Standard Condominium Corp. No. 2095 v. West Harbor City (I) Residences Corp.*, 2014 ONCA 724, 46 R.P.R. (5th) 1, this court upheld an agreement entered into between the Declarant and the captive board it appointed to limit the Declarant's liability for construction deficiencies, on the basis that the agreement was not contrary to the *Condominium Act* and had been fully disclosed to the unit purchasers.

[67] I have noted that the application judge was correct in finding that the Clubhouse is not a common element, and is not intended to become one. He did not err in refusing to apply *Newrey* to the Clubhouse. Based on the case law, I would decline the appellants' invitation to enlarge the reach of *Newrey* so that it applies not only to common elements and fixtures, but also to assets like the Clubhouse.

[68] This court's observation in *Tedley*, at para. 16, may be apt:

> Whether developers should be entitled to exclude from the common elements facilities of this nature or, indeed, other amenities ordinarily expected to be included in the common elements so as to have them purchased or otherwise dealt with after the unit purchases have been completed is a matter of policy for legislative and not judicial determination.

(2) Did Blue Shores have the right to mortgage the Clubhouse to Duca?

[69] The appellants submit that the existence of their equitable interests meant that Blue Shores had no right to mortgage the Clubhouse. Blue Shores and Duca support the application judge's decision that Blue Shores could do so.

(a) The Application Judge's Decision

[70] The application judge held that his answer to the first issue applied to the second issue; since Blue Shores owns the Clubhouse and the appellants have no interest in it, Blue Shores was entitled to mortgage the Clubhouse. He pointed out, at paras. 50 and 61, that nothing in any of the relevant documentation prohibited Blue Shores from mortgaging the Clubhouse.

[71] The application judge noted, at paras. 50-51, there has always been a mortgage on the property including the Clubhouse. Blue Shores' purchase of the property in 2003 was financed by a mortgage loan from HSBC Bank for $6 million; the principal amount was increased in 2004 to $17 million, and it has since been discharged. The Duca mortgage in the amount of $1 million was placed in 2009 and renewed in 2011.

(b) The Positions of the Parties

[72] The appellants submit that Blue Shores was prohibited from dealing with the Clubhouse in a manner that could defeat the appellants' equitable or inchoate interests, including mortgaging the Clubhouse.

[73] Blue Shores and Duca submit that because Blue Shores had title to the Clubhouse, it was permitted to mortgage the property. There was nothing in the condominium documents to the contrary, and the Clubhouse was already subject to a mortgage when the disclosure statements were executed. Duca argues the appellants are effectively asking the court to imply a term into the disclosure statements prohibiting Blue Shores from mortgaging the property.

(c) Discussion

[74] The condominium documents in this case, including the disclosure statements and the standard form purchase agreement, do not contain a provision prohibiting Blue Shores from granting encumbrances on the Clubhouse property, as the application judge noted. Even though I have concluded that the principles of contract and real estate law give the appellants an equitable interest in the Clubhouse, in my view Blue Shores was entitled to place a mortgage on the Clubhouse, and doing so was not an interference with the appellants' interest.

[75] The trust that arises from an agreement of purchase and sale of land is qualified. At least until the full purchase price is paid and the vendor is bound to convey, the vendor retains for certain purposes its ownership over the property: *Wall v. Bright* (1820), 37 E.R. 456 at p. 459; see also J. Victor Di Castri, *Law of Vendor and Purchaser*, loose-leaf (Toronto: Carswell, 1988), ch. 13 at p. 16.1; La

Forest, ch. 11 at p. 53. As noted earlier, this principle was accepted by this court in *Buchanan v. Oliver Plumbing & Heating Ltd*., and applied to condominiums in *Cam-Valley Homes.*

[76] Di Castri suggests that while the vendor whose title is subject to an equitable interest cannot deal with the property in a manner that would defeat the interest, it can do anything that does not cause prejudice: Di Castri, at pp. 13-17, citing *Hadley v. London Bank of Scotland Ltd.* (1985), 3 De G.J. & Sm. 63, at p. 69. This view appears to be consistent with this court's decision in *Robinson v. Moffatt* (1916), 31 D.L.R. 490. Explaining the relationship between a vendor and purchaser under an agreement for purchase and sale of land, the court wrote, at para. 14:

> Both at law and in equity, the vendor is the owner of the land in the sense of having the lawful title to it; the purchaser has only an equitable right to it … An agreement may never be carried into effect, it may end in nothing by various ways, and it may be that Equity, however measured, may refuse specific performance, and so the vendor may remain owner, unaffected by the agreement, without the aid of any Court. But, whether he does or not, he is still owner and can convey his ownership, subject of course to any equitable right which the purchaser may have: he has none at law except a personal action against the vendor if he should refuse or be unable to carry out his contract.

(The last sentence of the quote has to do with the arcanities of the different remedies at law and at equity, which do not concern us here.)

[77] In other words, the vendor can deal with the property as it sees fit, provided it can still comply with the terms of the conveyance obligation. Applying this principle to the facts of this appeal, the Duca mortgage has not prevented Blue Shores from conveying the Clubhouse in accordance with the disclosure statements. Blue Shores stated, at para. 20 of their application factum, that the "Duca Mortgage will be discharged from title prior to or at the time Blue Shores transfers ownership of the Clubhouse to the Applicants."

[78] Therefore, I conclude that Blue Shores was not precluded, by its trustee role or otherwise, from mortgaging the Clubhouse.

(3) Is Duca's mortgage subordinate to or void against the appellants' interest in the Clubhouse?

[79] This issue follows from the preceding issue in which it was determined that Blue Shores was entitled to mortgage the Clubhouse. It considers the effect of the appellants' registration of the notice of unregistered interest on the Clubhouse title on April 27, 2012, after the mortgage in favour of Duca had been both registered and renewed.

(a) The Application Judge's Decision

[80] The application judge found, at paras. 53-55, that the issue of priority as between Duca and the appellants, should Blue Shores default on the mortgage, was premature, since "[t]here is no claim or suggestion that Blue Shores has defaulted or that Duca is exercising its mortgage remedies, and no hint in the

evidence that a default is likely". He declined to answer this "speculative" and "merely hypothetical" question, noting that Blue Shores indicated it would discharge the Duca mortgage before conveying the Clubhouse to the appellants; there was no reason to doubt this statement at the time of the application.

(b) The Positions of the Parties

[81] The appellants argue that if the Duca mortgage is valid, it is subordinate to their interest in the Clubhouse, notice of which was registered on title. They submit that the application judge's finding, at para. 51, that Duca had actual knowledge of the conveyance obligation when it renewed its mortgage in November 2011, is sufficient reason to subordinate Duca's mortgage to the appellants' interest in the Clubhouse.

[82] Blue Shores and Duca submit that since the application judge was correct in finding that Blue Shores had the right to mortgage the Clubhouse, questions about priority are premature.

(c) Discussion

[83] I agree with the application judge that the issue of priority as between Duca and the appellants, should Blue Shores default on the mortgage, is premature and might never arise for practical purposes in this development.

[84] Given the prospect that a condominium corporation could register a notice of an unregistered interest against a declarant's title might have implications for

the financing of condominium projects more generally, I make a few observations.

[85] The financing pattern in this project shows that the developer borrowed money to buy the property and later to finance construction, and then paid down the mortgage security as units were sold. It is possible that the registration of a notice of an unregistered interest by a condominium corporation against property owned by the developer that is eventually to be transferred to the corporation could interfere with the project's financing, since lenders understandably abhor priority fights over their security.

[86] Duca cites *Holborn Property Investments Inc. v. Romspen Investment Corp.* (2008), 77 R.P.R. (4th) 262, for the proposition that it would take express language in the relevant agreement to permit the future recipient of title to prevent the registered owner from encumbering the property. In that case, the purchaser agreed, in the contract for sale of land, that it would not register its interest under s. 71(1.1) of the *Land Titles Act*. After the agreement was signed, the vendor refinanced two mortgages and granted a new mortgage, then defaulted. Addressing the question of priority between the purchaser and the mortgagee, Wilton-Siegel J. wrote, at para. 45:

> By precluding registration of the Agreement on title, clause 20(d) of the Agreement constitutes an interest in the Property that is subordinated to Romspen's interest as chargee under the First Mortgage and the Second

> Mortgage. The only reasonable inference from a covenant not to register, in an agreement that does not contain a covenant against further encumbering the Property, is that the Agreement is intended to be subordinate to any encumbrance registered against the Property after the date of the Agreement.

[87] Whether the *Holborn Property* type of contractual subordination is an available approach in the condominium area is not raised on the facts in this case and is best left to one where it is directly in issue. As noted earlier in these reasons, while the court will enforce statutory obligations, it will otherwise give effect to the language of the documents, as illustrated by *Tedley*, *Cam-Valley Homes*, and *West Harbor City*.

[88] The context of the ongoing tension between condominium corporations and developers is shown in the cases discussed earlier. Some developers do seek opportunities to increase their profits at the expense of condominium corporations and unit owners. As the *Newrey* line of cases shows, these efforts are sometimes not successful. Other times, they are. As this court observed in *Tedley*, the adjustment of the balance of power is a matter for legislation.

(4) Are the appellants entitled to an order that Blue Shores take steps to convert the Clubhouse from a freehold interest to a unit within a condominium corporation?

[89] As noted, article 5.01 of the EACSA and the disclosure statements related to two of the appellants provide that Blue Shores is to register the Clubhouse in one of the appellant corporations as a condominium unit. However, Blue Shores has not yet done so and instead continues to hold it in freehold ownership.

[90] On the application judge's reading of the disclosure statements and the EACSA, the Clubhouse could be registered as a unit at any time. He found that Blue Shores' failure to register the Clubhouse as a unit had not resulted in any prejudice to the appellants and did not give rise to any remedy. There is no error in the application judge's reasoning.

[91] Blue Shores indicates in its factum that it is prepared to consent to the conversion of the Clubhouse from freehold tenure to a condominium unit. Blue Shores took the same position before the application judge.

[92] Section 109(3) of the *Condominium Act* permits a judge of the Superior Court of Justice to make an order to amend the declaration or description registered under s. 2 of the Act. Given Blue Shores' consent to the amendment, I would grant an order to amend the declarations and descriptions to convert the Clubhouse to a condominium unit, but I would direct the parties to prepare the text of it.

(5) Is Blue Shores required to operate the Clubhouse on a non-profit basis and account to the appellants?

[93] As noted earlier, the EACSA between the appellants and Blue Shores provides that, as long as Blue Shores owns and operates the Clubhouse, each condominium unit owner is required to pay a monthly Clubhouse membership fee to the owner's respective condominium corporation. Each appellant condominium corporation is required to remit the aggregate of these membership fees to Blue

Shores, which constitute each appellant's allocated cost contribution ("ACC") for the Clubhouse under the EACSA. Article 6.01 of the EACSA sets the initial monthly fee payable by each unit owner at $100, and provides for an increase of up to 10 percent per year.

[94] The preamble to the EACSA provides that:

> The Phase 1 Corporation and the Declarant have on its own behalf and on behalf of the Future Phase Corporations entered into this Agreement on a non-profit basis in order to confirm the mutual use, management, operation, maintenance, repair, replacement and cost sharing of the Share Facilities…

(a) The Application Judge's Decision

[95] The application judge concluded, at para. 68, that the monthly fee at the time of the application, $128.26 per month per unit, was well within the permissible range of a $100 starting fee plus up to 10 percent annual increase from 2006 to 2011 set out in the EACSA. He noted, at paras. 78-79, that article 6.01 demonstrates that the ACC calculation is not dependent on operating costs, since it provides that the ACC would be calculated "irrespective of … the cost of operating and maintaining" the Clubhouse.

[96] The appellants rely on the preamble of the EACSA to argue that Blue Shores was obliged to operate the Clubhouse on a "non-profit basis" and to account to the appellants. The application judge rejected their interpretation of the meaning of "non-profit basis", since it would render other portions of the

EACSA essentially meaningless, such as the provision for a 10 per cent annual fee increase regardless of operating costs. He found no basis on which the appellants could claim an accounting with respect to the operation of the Clubhouse.

[97] The application judge also rejected the appellants' argument that Blue Shores could not use the ACC to pay the Duca mortgage. He found that Blue Shores was entitled to use its revenues to pay its bills in the ordinary course of business, which includes making payments on the Duca mortgage.

(b) The Positions of the Parties

[98] The appellants argue the application judge erred by not recognizing that the Clubhouse is a community centre, rather than a health club, which led him to misinterpret the ACC as a monthly membership fee rather than as a contribution "toward the costs incurred by the Declarant in connection with the Clubhouse Facilities". They reiterate their argument that the preamble of the EACSA, which calls for the operation of EACSA on a "non-profit basis", applies also to the Clubhouse and prohibits Blue Shores from earning a profit on it. They assert that the application judge should have applied the principle of *contra proferentem* in favour of the appellants to conclude that none of the parties can profit at the other parties' expense. The appellants sought an accounting of the Clubhouse's revenue and expenses to ensure this had not occurred.

[99] The appellants submit that the permitted annual increase of the ACC, "not exceeding 10%", must be interpreted in light of the requirement that the Clubhouse be operated on a non-profit basis. They argue that the inclusion of this provision in the EACSA is evidence that the parties intended "some criteria" be applied to determine the appropriate annual increase to the ACC. In particular, the ACC can only be increased to the meet operating costs.

[100] Blue Shores adopts the application judge's conclusion that the appellants' proposed interpretation of the EACSA does not make commercial sense.

(c) Discussion

[101] The application judge's interpretation of the "non-profit basis" phrase in the preamble to the EACSA was reasonable. The appellants' interpretation would result in a preambular provision effectively rendering important substantive provisions of the EACSA meaningless. Similarly, the appellants' request for an accounting of clubhouse expenses and profits has no basis in the EASCA.

[102] In context, the EACSA is intended to govern the Clubhouse during the time that Blue Shores is there and after it leaves. The commercial purpose of the arrangement while Blue Shores is on the site as the Declarant must be taken into account. Most of the provisions in the EACSA govern what are called the "Shared Facilities" and the "Shared Costs", and these are meant to be allocated on a "non-profit basis", hence the preamble.

[103] The important qualifier for the purpose of this appeal is that the Clubhouse is a "Shared Facility" under article 4.01, but "subject to the provisions of Article 5.00". Articles 5.00 and 6.00 govern the ownership and use of the Clubhouse facilities by Blue Shores as the Declarant. Blue Shores preserved for itself the right to operate the Clubhouse almost entirely free of constraint, while it is on the site marketing units, but leaving it open to use by "the residents and the guests of the Condominium Corporations". In particular, under article 5.02, Blue Shores, as the Declarant, has "the right to permit members of the public, on a user-fee basis" to use the Clubhouse, and "shall have no obligation to account for same to the Condominium Corporations". These provisions amply substantiate the application judge's view that Blue Shores retained ownership and control over the Clubhouse as "an essential amenity in the marketing of the project."

[104] While the appellants' theory is that the Clubhouse is intended to be a community centre will eventually hold sway, that will only be after Blue Shores conveys the Clubhouse and ceases to be the Declarant.

(6) Does the limitation period in s. 113 of the *Condominium Act* bar the appellants' claim?

[105] Section 113(3) of the *Condominium Act* permits a court to amend or terminate an agreement such as the EACSA if the disclosure statements did not provide sufficient disclosure, and the agreement "produces a result that is oppressive or unconscionably prejudicial" to the condominium corporation.

[106] The application judge found, at paras. 64-65, that, since the appellants did not meet the 12 month deadline for challenging the terms of the EACSA, as set out in s. 113 of the *Condominium Act*, they were limited to claiming damages for breach of its terms.

[107] The appellants disclaim any effort to challenge the EACSA, but only sought its interpretation in terms favourable to them. Contrary to the appellants' submissions, I have concluded that the application judge's interpretation of the EACSA was reasonable. In my view, s. 113 of the *Condominium Act* has no application to this case.

(7) Did Blue Shores' conduct constitute oppression?

[108] Under s. 135 of the *Condominium Act*, a court can make an order to rectify conduct that "is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant".

[109] The application judge acknowledged, at para. 97, that the oppression remedy in s. 135(2) of the *Condominium Act* can capture conduct that is legal but is nonetheless unfair in the sense that it violates the reasonable expectations of a party. However, he found that the conduct of Blue Shores did not breach this standard. The application judge determined that Blue Shores had not violated the appellants' contractual or property rights and the appellants had not

demonstrated any unfair conduct by Blue Shores that undermined their reasonable expectations.

[110] Since I have agreed with the application judge that the appellants have not established that Blue Shores has done anything wrong in its use and operation of the Clubhouse, it is clear that Blue Shores is not liable for oppression.

D. DISPOSITION

[111] I would allow the appeal. I would set aside paragraph 1 of the judgment ordering that Instrument SC976990 be discharged from title to the Clubhouse, and I would require the parties to prepare a consent order to convert the Clubhouse from freehold tenure to a condominium unit, under s. 109(3) of the *Condominium Act*.

"P. Lauwers J.A."

MacFarland J.A. (LaForme J.A. concurring):

[112] I have read my colleague's reasons and part company with him on two related points. First, I disagree that the disclosure statement contained an executory contract between Blue Shores Developments Ltd. ("Blue Shores") and the appellant condominium corporations in relation to the Clubhouse. Second, I disagree that the appellants have an interest in the Clubhouse that can be registered under s. 71(1) or (1.1) of the *Land Titles Act*, R.S.O. 1990, c. L.5.

[113] I would also decline to make an order under s. 109 of the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "Act") to amend the declaration. The parties are free to seek such an amendment in the Superior Court on consent. Apart from these points of disagreement, I agree with my colleague's disposition on the remaining issues.

A. The disclosure statement is not an executory contract

[114] The disclosure statement provides as follows:[1]

> The Declarant (or if applicable, its successors, or assigns) shall retain ownership of the Clubhouse Facilities and shall be responsible for the management, operation and control of same….
>
> Ownership of the Clubhouse Facilities shall ultimately be transferred to the Phased Condominiums, each as to one-quarter ownership as tenants-in-common by the Declarant (or any successor or assignee thereof) for

[1] As my colleague points out, the language of the conveyance obligation evolved somewhat through the various disclosure statements. I have quoted from art. 4.2 of the phase IV disclosure statement.

> total consideration of Two ($2.00) Dollars. Such conveyance shall occur within one hundred and twenty (120) days following the date that the Declarant (or any successor or assignee thereof) is no longer the registered owner of any lands within the Project (including the Phased Condominiums and/or the Future Development Lands) or such earlier time as the Declarant may determine in its sole and unfettered discretion (the "Clubhouse Transfer Date").

[115] In my opinion, the application judge was correct when he concluded, at para. 40, that this passage in the disclosure statement is not an executory contract between the appellants and Blue Shores:

> [40] In short, the requirement to convey the Clubhouse for consideration in the future is an obligation that Blue Shores will have in the future. It is not an executory contract which entitles the Applicants, or any of the unit purchasers, to equitable title and the equitable remedy of specific performance. That is not what any document says because it is not what the Applicants, or any of the individual condominium purchasers, bargained for.

[116] The requirement to provide a disclosure statement is set out in s. 72(1) of the Act. Under s. 72(1), a declarant must provide "to every person who purchases a unit or a proposed unit from the declarant a copy of the current disclosure statement made by the declarant for the corporation of which the unit or proposed unit forms part." Agreements of purchase and sale for a condominium unit are not binding on the purchaser until the disclosure statement is delivered: s. 72(2). When the purchaser receives the disclosure statement, he or she may rescind the agreement of purchase and sale "before accepting a

deed to the unit being purchased that is in registerable form": s. 73(1). The Act sets out the formal requirements for a rescission: s. 73(2).

[117] The declarant is also required to deliver a revised disclosure statement to the purchaser "[w]henever there is a material change in the information contained or required to be contained in a disclosure statement": s. 74(1). Purchasers again have rights to rescind the agreement of purchase and sale after delivery of the revised disclosure statement "before accepting a deed to the unit being purchased that is in registerable form", and in other circumstances: s. 74(6).

[118] The Act provides enforcement mechanisms. For example, s. 133(1) provides that a declarant shall not, in a statement that it is required to provide, "make a material statement or provide material information that is false, deceptive or misleading" or "omit a material statement or material information that the declarant is required to provide." Where such a material misstatement or omission is made, a corporation or unit owner may sue for damages in certain circumstances: s. 133(2).

[119] One purpose of the disclosure statement is to "enable individuals contemplating the purchase of a condominium unit to have a full understanding of their rights and obligations on unit purchase but more importantly, what the costs of owning it will be": *90 George Street Ltd. v. Ottawa-Carleton Condominium Corp. No. 815*, 2015 ONSC 336, 51 R.P.R. (5th) 287, at para. 7.

Furthermore, as Rosenberg J.A. observed in *Middlesex Condominium Corp. No. 87 v. 600 Talbot Street London Ltd.* (1998), 37 O.R. (3d) 22 (C.A.), at p. 37:

> [A]n aspect of the disclosure requirement is to assist in resolving disputes between the declarant and the owners and the corporation about which assets and common elements are intended to be included in the purchase price.

[120] Accordingly, a disclosure statement provided under s. 72 of the Act has a unique purpose within the condominium law regime.

[121] My colleague relies on *Peel Condominium Corp. No. 417 v. Tedley Homes Ltd.* (1997), 35 O.R. (3d) 257 (C.A.), for the proposition that condominium documents can be enforceable contracts that may give rise to obligations to convey property in the condominium context. In my view, however, *Tedley* is distinguishable. In *Tedley*, the disclosure statement and declaration given to prospective purchasers specified that the condominium corporation was under a "duty and obligation" to purchase a superintendent's unit and two guest units in each of the buildings, pursuant to the terms of the "conveyance and purchase agreement", which was attached to the disclosure statement in draft form. The condominium documents also provided the total purchase price and a payment schedule. The first directors of the condominium corporation subsequently enacted a by-law authorizing the execution of the conveyance and purchase agreement and completed the agreement on behalf of the condominium

corporation. The condominium corporation then brought an application seeking a declaration that the conveyance and purchase agreement was void.

[122] My colleague refers to Robins J.A.'s remarks on the effect of the declaration and disclosure statement, at p. 265:

> I would not think it open to the elected directors after closing to effectively amend the declaration by refusing to complete a transaction that had been accepted by all of the owners, including the directors themselves.... The agreement to purchase the six suites cannot be considered 'unilateral' in these circumstances or treated as having been 'foisted' on the corporations or its directors or the unit owners. To the contrary, as I have said, in completing the agreement the first directors were acting in compliance with a contract the terms of which had been approved by the unit owners.... [Emphasis added.]

[123] When Robins J.A. used the word "contract", he was referring to the draft conveyance and purchase agreement that had been appended to the disclosure statement. This is made clear by his description of the purchase documents, at p. 263:

> Clearly, each of [the condominium unit owners] agreed by way of their purchase documents that the superintendent and guest suites were not included in the purchase price. The disclosure statement and declaration made it abundantly clear that these suites were to be purchased by the condominium corporation and used as common elements in accordance with the terms of the conveyance and purchase agreement. [Emphasis added.]

[124] Therefore, *Tedley* does not support the proposition that the disclosure statement could, in and of itself, constitute a contract between the developer and the condominium corporation. Indeed, in *Tedley*, the condominium corporation executed a separate conveyance and purchase agreement in order to purchase the superintendent's unit and guest units.

[125] Moreover, I agree with the application judge's conclusion that, in this case, the disclosure statements expressly indicated that an interest in the Clubhouse was not being conveyed with the sale of each condominium unit. The application judge wrote, at paras. 23-25:

> [23] The purchasers take their title to each unit "subject to the Condominium Documents", which means that the Condominium Documents must actually be read in order to determine their actual impact on title. While the Applicants [*i.e.*, the appellant condominium companies] are correct that the phrase "Condominium Documents" includes the Disclosure Statement, they are incorrect in their interpretation of the impact of that inclusion. As indicated above, article 4.3 of the Disclosure Statement specifically provides that an interest in the Clubhouse is *not* being conveyed with each sale. The Disclosure Statement's incorporation by reference into the agreement of purchase and sale of each unit confirms that each of those agreements excludes the purchase and sale of the Clubhouse.
>
> [24] The agreements of purchase and sale allocate no money to the purchase of the Clubhouse, and contain no requirement that the Clubhouse be conveyed to the Applicants in return for the purchasers' respective purchase prices. Article 4.3 provides that a contract for the purchase of the Clubhouse shall be entered into in the future between the Applicants and Blue Shores, and

> at that point the Applicants will pay the stipulated purchase price. The purchase price, although nominal, has not yet been paid by the Applicants, as the contract of sale for the Clubhouse has not yet been entered into.
>
> [25] In other words, Blue Shores, as developer, is obliged under the statutorily required Disclosure Statement to contract with the Applicants for the sale of the Clubhouse once all of the units and other property have been sold. The basic terms of that future contract, but not its date, have been described in art. 4.3, but no consideration has flowed and there is no existing executory contract. No equitable title has passed to the Applicants as it would if Blue Shores had actually entered an agreement of purchase and sale of the Clubhouse with the Applicants, and there is therefore nothing on which specific performance might operate in the usual way that it does with agreements to convey real estate.

[126] My conclusion that the disclosure statement did not constitute a binding executory contract between Blue Shores and the appellants does not necessarily leave the latter without a remedy. As mentioned above, under s. 133(2) of the Act, a condominium corporation has a statutory right to sue for damages in certain circumstances, in the event that the disclosure statement contains a material statement or material information that is false, deceptive or misleading:

> A corporation or an owner may make an application to the Superior Court of Justice to recover damages from a declarant for any loss sustained as a result of relying on a statement or on information that the declarant is required to provide under this Act if the statement or information,
>
> (a) contains a material statement or material information that is false, deceptive or misleading; or

> (b) does not contain a material statement or material information that the declarant is required to provide.

[127] However, as the parties have not raised s. 133(2), I should not be taken as expressing an opinion on its application in the circumstances of this case now or in the future.

[128] Accordingly, I agree with the application judge that the provision in the disclosure statement obliging Blue Shores to ultimately transfer ownership of the Clubhouse to the appellants does not constitute an executory contract.

B. The appellants have no interest that can be registered under the *Land Titles Act*

[129] Given my conclusion that the disclosure statement does not constitute an executory contract, I do not agree with my colleague that the principles of contract law and real estate law operate to give the appellants an equitable interest in the Clubhouse. However, I agree with my colleague that the line of cases beginning with *York Condominium No. 167 v. Newrey Holdings Inc*. (1981), 32 O.R. (2d) 458 (C.A.), does not support the appellants' argument that they have an equitable interest in the Clubhouse.

[130] Thus, in my view, the appellants have no rights that are capable of registration under either s. 71(1) or (1.1) of the *Land Titles Act*. Accordingly, I would not interfere with the application judge's order vacating the registration that the appellants entered on the register.

C. Duca Mortgage and Priorities

[131] I agree with my colleague's conclusion that the Duca mortgage is valid.

[132] The evidence discloses that Blue Shores is still the owner of the Clubhouse. Under the disclosure statement, Blue Shores has no obligation to convey the Clubhouse until 120 days after the date on which it is no longer the registered owner of any lands within the project. As owner of the property, Blue Shores was entitled to mortgage the property and there is no prohibition to it doing so in any of the condominium documentation.

[133] Blue Shores has undertaken to discharge the mortgage from title before it conveys title to the appellants.

D. Conversion of the Clubhouse from Freehold to a Condominium Unit

[134] At para. 52 of its factum, Blue Shores stated that it is prepared to consent to the conversion of the Clubhouse from freehold tenure to a condominium unit, although it points out it has no obligation to do so.

[135] The appellants may bring an application on consent to the Superior Court of Justice under s. 109 of the Act for the necessary order.

E. Remaining issues

[136] I agree with my colleague's disposition of the remaining issues, namely:

(a) whether Blue Shores is obligated to run the Clubhouse on a non-profit basis and to account;

(b) whether the limitation period in s. 113 of the Act bars the appellants' claim; and

(c) whether Blue Shores' conduct constitutes oppression under s. 135 of the Act.

F. Disposition

[137] In the result, I would dismiss the appeal. I would award costs of the appeal to the respondent, Blue Shores, fixed in the sum of $18,000, and to the respondent, Duca Financial Services Credit Union Ltd., in the sum of $15,000, both on a partial indemnity basis and inclusive of disbursements and HST.

Released: May 27, 2015 "JMacF"

"J. MacFarland J.A."
"I agree H.S. LaForme J.A."