

Case Name:

Toronto Standard Condominium Corp. No. 1703 v. 1 King West Inc.

**RE: Toronto Standard Condominium Corporation No.
1703, and
1 King West Inc. et al.**

[2008] O.J. No. 1264

Court File No. 07-CV-329252PD1

Ontario Superior Court of Justice

Master B.T. Glustein

Heard: March 26, 2008.
Judgment: April 3, 2008.

(54 paras.)

Counsel:

Mark H. Arnold for the plaintiff.

Patricia M. Conway for the defendants 1 King West Inc., King West Developments Inc. and Projectcore Inc.

REASONS FOR DECISION

MASTER B.T. GLUSTEIN:--

Overview

1 The defendants 1 King West Inc., King West Developments Inc. and Projectcore Inc. (collectively, the "King West Defendants") bring this motion under Rule 30.06(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*") for an order that the plaintiff, Toronto Standard Condominium Corporation No. 1703 ("TSCC 1703") produce a further and better affidavit of documents.

2 In particular, the King West Defendants seek an order that TSCC 1703 produce the following documents for all individual unit owners of the condominium building located at 1 King Street West in Toronto (the "Unit Owners"):

- (a) agreements of purchase and sale with respect to the purchase of the units (the "Agreements");
- (b) all correspondence between the defendant 1 King West Inc.¹ and the Unit Owners before and after the closing (the "Correspondence");
- (c) each Unit Owner's Certificate of Completion and Possession (the "Completion Certificates"); and
- (d) Reporting letters received by the Unit Owners from their lawyers following closing (the "Reporting Letters") and any and all communications from the Unit Owners or their counsel reviewing their rights notwithstanding closing (the "Communications re: Rights").

3 This motion raises a novel issue which counsel advise has not been considered by Ontario courts or courts in other jurisdictions: on a motion for a further and better affidavit of documents, can an adverse party require a nominal party to produce relevant documents in the possession, control or power of the person on whose behalf the action is brought or defended (the "beneficiary")?

4 In this case, the issue arises because TSCC 1703 brings an action on behalf of the Unit Owners under section 23 of the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "*Condominium Act*") for damages to individual units (as well as for damages to the common elements), but TSCC 1703 has not produced any of the documents of the individual Unit Owners.

5 In brief, I conclude that if an adverse party can establish upon persuasive evidence² that a beneficiary has relevant documents in its possession, control or power, the nominal party must produce a further and better affidavit of documents. In essence, the nominal party brings or defends the action on behalf of the beneficiary, and as such, the definition of a "party" with obligations to produce documents under Rule 30.02 is sufficiently broad to include documents held by the beneficiary. Consequently, the nominal party should be required to produce such documents on a motion for a further and better affidavit of documents, regardless of whether those documents are in the nominal party's "possession, control or power".³

6 Further, Rule 31.03(8) provides a right to examine the beneficiaries for discovery, which brings with it commensurate production obligations in order to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits (under Rule 1.04).

7 In this matter, the evidence is persuasive that the Unit Owners have relevant Agreements and Completion Certificates which they have not produced. In particular, the evidence is that the Agreements were in many cases customized to each Unit Owner, with changes to the vendor's obligations. Further, each Unit Owner signed a Completion Certificate listing deficiencies, which is of particular importance since the Agreements provided that the units were fully accepted as fulfilling the vendor's obligations, save for items listed in the Completion Certificates. Finally, the evidence is that in many cases there was negotiation through correspondence between vendor's and purchaser's counsel leading to the ultimate closing of the transaction (the "Negotiation Correspondence").

8 While the King West Defendants have produced those Agreements and Completion Certificates in its possession, the evidence is that the King West Defendants do not have all such documents from all Unit Owners. In any event, TSCC 1703 has not admitted the authenticity of those documents which the King West Defendants have produced.

9 However, I do not find persuasive evidence that Reporting Letters or Communications re: Rights are relevant to the issue of whether there were deficiencies in the individual units. In any event, some or all of these documents may be privileged (an issue I do not decide on this motion).

10 Further, while the King West Defendants seek "all correspondence relating to the transaction between 1 King West Inc. and all [Unit Owners]", there is no evidence about the relevance of "Non-Negotiation Correspondence" (*i.e.* correspondence other than the "Negotiation Correspondence"), and no evidence that all Negotiation Correspondence would be relevant to the deficiencies alleged in the statement of claim.

11 Consequently, the affidavit evidence filed by the King West Defendants does not support the blanket production order they seek in this motion.

12 I order that TSCC 1703 produce the Unit Owners' Agreements and Completion Certificates, but not the Unit Owners' Reporting Letters, Communications re: Rights, and Non-Negotiation Correspondence. Also, I restrict production of the Negotiation Correspondence to any correspondence which relates to the deficiencies alleged in the statement of claim. This order is without prejudice to the King West Defendants seeking further documents (including those of which I refuse production on this motion) either following examination for discovery or upon fresh evidence.

The nature of the action

13 TSCC 1703 is a condominium corporation comprised of between 400 and 500 unit owners' of residential units and their appurtenant common elements situated within a high rise building and renovated original historic building formerly known as the Toronto Dominion Bank Building located at 1 King Street West in Toronto (previously defined as the "Unit Owners").

14 1 King West Inc. was the developer and declarant of the condominium corporation and was the vendor of all of the units.

15 TSCC 1703 brings this action under section 23 of the *Condominium Act*.

16 Section 23(1) of the *Condominium Act* provides that a condominium corporation can bring an action "on its own behalf *and on behalf of an owner*". The condominium corporation may commence such an action "*in respect of any damage to common elements, the assets of the corporation or individual units*" (section 23(1)(a)), and "*with respect to a contract involving the common elements or a unit, even though the corporation was not a party to the contract in respect of which the action is brought*" (section 23(1)(b)) (*italics added*).

17 TSCC 1703 claims \$20 million in damages for alleged deficiencies in both the common elements and the individual units. The action is based on (i) negligence against all of the defendants, (ii) breach of warranty against 1 King West Inc. and King West Developments Inc., and (iii) breach of contract against Projectcore Inc. and EllisDon Corporation.

18 The breach of warranty claim is based on an identical warranty provision as pleaded at paragraph 22 of the statement of claim.

19 Paragraphs 1-4 of the statement of claim make clear that "the plaintiff claims on its own behalf and on behalf of its unit owners", as it is permitted to do so under section 23 of the *Condominium Act*.

20 TSCC 1703 asserts the alleged deficiencies at paragraphs 32 and 33 of the statement of claim, which include alleged deficiencies with individual units (see paragraph 32(1) and almost all of the 27 alleged deficiencies at paragraph 33).

21 While counsel for TSCC 1703 asserted in his factum and before the court that the claim dealing with unit construction deficiencies is based only upon a warranty given to each Unit Owner by 1 King West Inc. as vendor, the claim is framed in both negligence and breach of warranty or breach of contract.

The relevant evidence on this motion

22 The King West Defendants filed an affidavit of Mr. Peter Kofman ("Kofman"), a director of 1 King West Inc., which was not challenged through the responding affidavit filed by TSCC 1703. TSCC 1703 did not cross-examine Kofman on his affidavit. Consequently, I accept the evidence in the Kofman affidavit and summarize the salient portions of his evidence as follows:

- * Neither the affidavit of documents of TSCC 1703 dated September 28, 2007, nor the supplementary affidavit of documents of TSCC 1703 dated October 10, 2007 contain any of the sale transaction documents or correspondence concerning the purchase transactions between 1 King West Inc. and the individual Unit Owners.
- * The Agreements signed by the Unit Owners were in many cases customized to individual purchasers, and often included several amendments. Changes were made in many cases to the vendor's obligations under the Agreements.
- * In many cases, there was negotiation through the correspondence between vendor's and purchaser's counsel leading to the closing of a transaction.
- * Purchasers signed Completion Certificates, which listed deficiencies. The Agreements provided that the units were fully accepted as fulfilling the vendor's obligations, save for items listed in the Completion Certificates.
- * Copies of some of these documents are in the possession of 1 King West Inc., but many are not. When the purchase files were turned over by Mr. Harry Stinson, a former director of 1 King West Inc., the files were not complete.

23 The King West Defendants filed a supplementary affidavit of documents in which they listed their copies of many, but not all, of the documents they seek from the Unit Owners. TSCC 1703 has not admitted the authenticity of those documents.

24 In response, Mr. Brian J. Smith, a director and president of TSCC 1703, swore an affidavit in which he deposed that the documents sought were not in the "possession, control or power" of TSCC 1703. As I discussed above, given my conclusion that a nominal party is required to produce documents in the possession, control or power of beneficiaries upon persuasive evidence that such documents have been omitted from the nominal party's affidavit of documents, Mr. Smith's evidence as to TSCC 1073's "possession, control or power" is not relevant to this motion.

25 In any event, Mr. Smith's statement is effectively a legal argument. If I had been required to consider the issue, I would have done so from the perspective of case law as to the definition of those terms.

Analysis

26 I find that TSCC 1703 must produce the Agreements, Completion Certificates, and Negotiation Correspondence relating to the alleged deficiencies. I base this conclusion on three grounds:

- (i) The definition of a "party" under Rule 30.02 is broad enough to include beneficiaries to an action brought or defended by a nominal party, such that when there is persuasive evidence that a beneficiary has relevant documents, the documents should be produced by the nominal party on a motion for a further and better affidavit of documents.
- (ii) Rule 31.03(8) provides a right to examine the beneficiaries for discovery which brings with it commensurate production obligations in order to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits (under Rule 1.04).
- (iii) The Agreements, Completion Certificates, and Negotiation Correspondence relating to the alleged deficiencies are relevant, and the request for those documents is not abusive, onerous, or otherwise improper.

I address each of these grounds below.

- (a) **The definition of a party under Rule 30.02 is broad enough to include production by a beneficiary on a motion for a further and better affidavit of documents from a nominal party**

27 The starting point of my analysis is Rule 30.02(1), which provides that "every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document". Consequently, the issue before the court is whether a nominal party should produce relevant documents in the hands of a beneficiary, if there is persuasive evidence that such documents exist on a motion for a further and better affidavit of documents.

28 The issue in this case arises because TSCC 1703 is a "nominal" plaintiff, since the action with respect to damage to individual units is brought in the name of the Unit Owners. The nominal status is clear from the statement of claim, as well as under section 23(1) of the *Condominium Act*, which allows for an action to be brought on behalf of unit holders for damage to individual units.

29 The nominal status of a condominium corporation in an action for damage to individual units is further confirmed by section 23(4) of the *Condominium Act*, which provides that a judgment for payment in favour of the corporation in an action that the corporation commences *on its own behalf*

is an asset of the corporation (italics added). On this point, I adopt Master Sandler's analysis of a predecessor section to section 23(4) in *Metro Toronto Condominium Corp. No. 539 v. Priene Ltd.* (1984), 48 O.R. (2d) 313 (Mast.) at 318 ("*Priene*");

Further, s. 14(4) [now s. 23(4)] makes an implied distinction between "any judgment for payment in favour of the corporation in an action brought *on its own behalf*" (my emphasis), and any judgment for payment in favour of the corporation in an action brought *on behalf of any unit owner*. **Only the former type of judgment is an asset of the corporation. It follows that the latter type of judgment is not, but rather is an asset of the unit owner.** [italics in original, emphasis added]

30 In *Priene*, Master Sandler concludes that while individual unit owners need not be named in the style of cause, it is still "their action". Master Sandler reviews the nature of an action brought by a condominium corporation for damages to individual units. I adopt his analysis, the salient excerpt which I set out below (*Priene*, at 317):

Under s. 14, the corporation may sue "on its own behalf" and it may also sue "on behalf of any owner". This section then goes on to specify three quite different classes of property, namely, the "common elements", "the assets of the corporation", and the "individual units". Of these three classes of property, only the first two belong to the corporation whereas the individual units belong to each individual unit holder. In my view, under s. 14, the corporation may sue *on its own behalf* for damage to its property, that is, the common elements and other corporation assets, and the individual unit holders *cannot* sue for this damage. **However, for damage to the individual units, the action can be brought by the appropriate unit holder or holders concerned, themselves, or by the corporation "on behalf of any owner". In this latter type of action, the individual holders need not be named in the style of cause but it is still their action**, and this is made clear by the concluding words of s. 14(1), which imposes an obligation to pay legal and court costs directly upon the owner or owners on whose behalf the action is commenced in respect of damage to their individual units, albeit in the proportion in which their interests are affected. [italics in original, emphasis added]

31 Master MacLeod took a similar approach in *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada*, [2003] O.J. No. 5703 (Mast.) (*1176560 Ontario Ltd.*), in which the defendant sought the individual records of all of the franchisees who would benefit from the class action brought by the representative plaintiff. Master MacLeod held that "the motion falls to be determined largely on the question of relevance" (*1176560 Ontario Ltd.*, at para. 19), rather than dismissing the motion on the basis that beneficiaries had no obligation to produce documents because such documents were not in the possession, control or power of the representative plaintiff (a position urged by TSCC 1073 in this case).

32 Master MacLeod also noted the importance of the court's discretion to control the discovery process to avoid unduly onerous or abusive requests and to control costs, issues I address later in these reasons.

33 Consequently, I find that the definition of "party" under Rule 30.02 is broad enough to require production of relevant documents by a beneficiary in an action brought or defended by a nominal party, and as such the nominal party is required to produce relevant documents on a motion for a further and better affidavit of documents.

(b) **The requirement for examination for discovery of beneficiaries under Rule 31.03(8) is consistent with documentary production requirements, particularly when read in conjunction with Rule 1.04(1).**

34 Rule 31.03(8) is clear that a party has a right to examine a beneficiary for discovery. Rule 31.03(8) provides:

Where an action is brought or defended for the immediate benefit of a person who is not a party, the person may be examined in addition to the party bringing or defending the action.

35 In *Priene*, Master Sandler considered a predecessor rule to Rule 31.03(8), and held that the defendant had the right to examine each of the unit owners for discovery, which "might even reach as high as 50 to 80 persons" (*Priene*, at 317). He concluded (*Priene*, at 318):

Thus, each particular action must be looked at to see if the condominium corporation is suing for damages to the common elements or to the individual units or both, and if an action for damages is brought by the condominium corporation as plaintiff, in whole or in part, in respect of damage to one or more of the individual units, then such an action is, by the very wording of s. 14(1), brought "on behalf of" an owner. **It follows that such an action is prosecuted, at least in part, "for the immediate benefit of" the unit holder(s) and the defendant(s) can examine the unit holder(s) under Rule 333 in addition to examining a representative of the nominal plaintiff, the condominium corporation.** [italics in original, emphasis added]

36 In *Waterloo North Condominium Corp. No. 64 v. Domlife Realty Ltd.* (1989), 70 O.R. (2d) 210 (H.C.J.) ("*Waterloo North*"), Rosenberg J. relied on *Priene* and upheld the master's decision that the only unit owners who had to be produced for examination for discovery were those on whose behalf claims were made for damages to individual units (*Waterloo North*, at 212 and 221).

37 Since the King West Defendants have the right to examine each of the individual Unit Owners with respect to their individual unit claims made on their behalf by TSCC 1703, it brings with it a corresponding obligation to produce documents prior to examination for discovery.

38 Rule 31.03(8) specifically ensures that beneficiaries can be examined for discovery. However, the express inclusion of such a right for examination for discovery does not mean that the beneficiary is free from any obligation for documentary production.

39 To the contrary, not only is Rule 30.02 broad enough to include documentary discovery by a beneficiary (as I discussed above), it would be illogical for an adverse party to examine a beneficiary under Rule 31.03(8) solely to request documents (or to request that such documents be brought to the examination for discovery), and then conduct further examinations for discovery if proper production were not made. Such an approach would be contrary to Rule 1.04(1), which mandates that the *Rules* be interpreted to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

40 TSCC 1703 submits that individual examinations for discovery under Rule 31.03(8) are required in order to obtain documentary production. However, that approach leads to a cumbersome, expensive, and time-consuming process which could largely be avoided if documents are produced prior to the examinations for discovery. If the King West Defendants were required to examine each of the more than 400 Unit Owners for discovery under Rule 31.03(8), simply to obtain documents to determine whether there were any differences in the Agreements, Completion Certificates, or Negotiation Correspondence relevant to the deficiency claims for the individual units, the civil proceedings would devolve into months of examinations for discovery, reattendances for examinations on further documents, and resulting refusals or undertakings motions.

41 Conversely, production of those documents beforehand could well avoid the attendance of many if not all Unit Owners, and would result in a dramatically truncated discovery process. It could not be to the benefit of either party to engage in the process arising from TSCC 1703's position.

42 TSCC 1703 submits that the King West Defendants would not examine each Unit Owner, and that the request for documents is simply an attempt to "harass, delay, intimidate and run up legal costs rather than for the *bona fide* purpose of discovery of the unit deficiencies which the moving parties could obtain by examining the authors of [TSCC 1703's consulting engineers'] report".

43 However, as discussed below, the persuasive evidence is that the Agreements, Completion Certificates, and Negotiation Correspondence which relates to the deficiencies in the units are relevant to the issues of the individual expectations of the parties and their satisfaction with the work on the individual units. Consequently, I accept the submission of counsel for the King West Defendants that they would conduct individual examinations to address these individual issues.

(c) **The Agreements, Completion Certificates, and Negotiation Correspondence relating to unit deficiencies are relevant and the production requirements are not unduly onerous**

44 TSCC 1703's counsel submitted that the King West Defendants had all (or at least a majority) of the documents they sought. However, the uncontradicted evidence is that the King West Defendants do not have all of the documents they seek.

45 Further, the production by one party of its copy of an agreement or certificate does not remove the obligation of a party to produce its copy, particularly when, as in this case, TSCC 1703 has not admitted the authenticity of any of the documents produced by the King West Defendants.

46 Given the uncontradicted evidence of Kofman as to the individual differences in the Agreements, Completion Certificates, and Negotiation Correspondence⁷, these documents meet the settled tests for relevancy, regardless of whether the claim is framed solely in breach of warranty or also in negligence. If a Unit Owner claims damages for deficiencies in his or her unit, the agreements, certificates, and correspondence concerning those deficiencies are relevant.

47 There is no evidence that the request would be unduly onerous or an abuse of process. I agree with Master MacLeod that "the court has discretion to control the discovery process" and that "relevant inquiries may be restricted if they are unduly onerous or abusive" (*1176560 Ontario Ltd.* at paras. 11-12). However, there is no evidence before the court to suggest that TSCC 1703 could not seek these documents from the Unit Owners, particularly when they have sent notices to each Unit Owner already, as required under section 23(2) of the *Condominium Act*, advising of the litigation.⁸

48 In other cases, production of the same documents from each unit owner of a condominium corporation may not be required, as there may be no salient differences between agreements or correspondence that would be relevant to a claim for deficiencies in individual units. In those cases, a corporation condominium could produce the relevant contracts related to the work, the alleged warranty at issue (which would be the same in each agreement of purchase and sale), and evidence as to damages. A request by a defendant for documents from individual unit owners in those circumstances might be considered abusive or unduly onerous.

49 However, if there is persuasive evidence from a defendant as to the existence of relevant documents held by beneficiaries (as in this case), or if the nominal party is aware of the existence of such documents through making a request of the beneficiaries for relevant documents⁹, such production is required.

50 With respect to the Reporting Letters, Communications re: Rights, and other Correspondence, there is no evidence as to why these documents relate to any issues in the action, other than a generic statement by Kofman that the King West Defendants "require that [TSCC 1703] produce" the documents. This does not meet the level of "persuasive" evidence required on a motion for a further and better affidavit of documents.¹⁰

Order and costs

51 I order TSCC 1703 to file a further and better affidavit of documents which is to include the Agreements, the Completion Certificates, and the Negotiation Correspondence relevant to the deficiency claims. I do not order TSCC 1703 to produce the remainder of the documents sought in the notice of motion.

52 Counsel agreed that \$10,000 was a reasonable quantum of costs for this motion. I agree. The King West Defendants were predominantly successful in that the motion was required to obtain certain of the documents and I did not accept TSCC 1703's position that production should not be ordered. However, I did not agree that all the documents sought by the King West Defendants should be produced.

53 Consequently, I fix costs in the amount of \$7,500, inclusive of GST and disbursements, payable by TSCC 1703 to the King West Defendants within 30 days of this order. This amount reflects the considerable, although not entire, success of the King West Defendants on this motion, as well as the complexity and importance of the issues raised in the motion.

54 I thank counsel for the thoroughness of their written and oral submissions, and the excellent assistance to the court through their strong argument.

MASTER B.T. GLUSTEIN

cp/e/qlkxl/qlpwb

1 1 King West Inc. is the declarant and vendor of the condominium units.

2 This is the applicable test for a further and better affidavit of documents (see *Greymac Trust Co. v. Burnett* (1987), 59 O.R. (2d) 50 (H.C.J.) at 57; and *RCP Inc. v. Wilding*, [2002] O.J. No. 2752 (Mast.) at para. 9).

3 TSCC 1703 argued that documents in the hands of the Unit Owners were not in its "possession, control, or power" (as the term is used in Rules 30.02 and 30.03) as it could not compel production of the documents from individual Unit Owners. Given my conclusion that the definition of a "party" with obligations to produce relevant documents includes a beneficiary and that such production should be made through a nominal party if there is persuasive evidence that relevant documents have been omitted in an affidavit of documents, the argument raised by TSCC 1703 is not relevant to my conclusion. Consequently, I do not decide this motion on the basis of the case law addressing the definitions of "possession", "control", or "power".

4 There is some discrepancy in the number of Unit Owners. In the affidavit of Mr. Kofman filed by the King West Defendants, he refers to "400+", while the affidavit of Mr. Smith filed by TSCC 1703 refers to approximately 500 Unit Owners. However, such a discrepancy is not relevant to my analysis and I make no factual finding on the issue.

5 There are two paragraphs numbered "33" in the statement of claim. The deficiencies are pleaded in the first of these two paragraphs.

6 In any event, as discussed below, given the evidence on the motion as to the potential differences in the Agreements and the importance of the Completion Certificates and the Negotiation Correspondence relating to deficiencies in the individual units, these documents would be relevant even if the claim were limited to breach of warranty or breach of contract.

7 (insofar as the Negotiation Correspondence relates to the alleged deficiencies in the units).

8 The notices also provided, although not required under the *Condominium Act*, that each Unit Owner could opt out of the litigation if they so desired.

9 Plaintiff's counsel advises that TSCC 1703 made a request to the Unit Owners for individual documents, but received little or no response. However, given the evidence that such individual documents exist and are relevant, the nominal plaintiff must produce them.

10 Documents such as the Reporting Letters and some of the Communications re: Rights may also be privileged, although I do not decide the issue as it is not before me.