COURT FILE NO.: 05-CV-295915PD1
DATE: 20070807

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
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WALIA PROPERTIES LTD.	)	*Patricia M. Conway*, for the Applicants
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	)	
Applicants	)	
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	)	
- and -	)	
	)	
	)	
YORK CONDOMINIUM CORPORATION NO. 478 REXDALE MEWS INC., REXDALE (MORKI) INC.	)	*Stephen M. Turk, Samuel S. Marr*, for the Respondents
	)	
	)	
Respondents	)	
	)	
	)	**HEARD:** May 14, 2007

Harvison Young J.

Introduction

REASONS FOR JUDGMENT

[1] This application arises out of a long-standing dispute between the commercial unit owners of York Condominium Corporation No. 478 (the "Condominium") and the residential unit owners. This mixed use condominium was registered as a condominium in 1979 and is located at Islington Avenue and Rexdale Boulevard. It is comprised of a three-storey building of which the main, or street level, is comprised of commercial units and the upper two storeys are residential units. There are 60 residential units, 59 of which are owned by the Rexdale companies ("Rexdale") owned by Mr. Cecil Bergman. The residential units are rented out. There are 30 commercial units.

[2] Many of the commercial owners purchased their units in power of sale proceedings in 1997. Mr. Bergman acquired 59 of the 60 residential units when he purchased all of the shares of the Rexdale companies in 2003. It is common ground that at the time that Mr. Bergman, an experienced developer and real estate investor, acquired the residential units they were very run down and it was difficult to attract and retain tenants. He aimed to improve the units and he has clearly done so, despite some continuing difficulty retaining tenants.

[3] The commercial owners complain that they are, in effect, subsidizing the improvements to the residential units, and they allege that the proportion of the common expenses that they pay is unfair. Moreover, they are unhappy because the common expenses have doubled since the commercial owners acquired their units. In addition, they complain that they have been effectively "ousted" from the Condominium's Board, with the result that they have no right to participate in the decision making processes that have direct impacts on their interests.

[4] The response of Rexdale and the Condominium is that the proportion of common expenses that the commercial owners pay is set out in the declaration that was disclosed to the buyers pursuant to the provisions of the Condominium Act (the "Act") when they acquired their units. They point out that all of them had lawyers. The increased common expenses have, they say, arisen largely as a result of increased energy and utility costs and other expenses. The alleged "ousting" of the commercial owners was the result, they say, of a perfectly legal exercise of their majority votes to appoint board members who will not engage in a deadlock of the board.

The Issues

[5] The applicants seek the following relief:

> (i) an order amending the Declaration to reallocate their percentage contribution to the common elements of the residential and commercial units on the basis of their respective square footage; and
>
> (ii) a declaration that the conduct of the residential owners in removing the two commercial directors from the Board and replacing them with non-owners is "oppressive, unfairly prejudicial to, and disregards the interests of the commercial owners," and an order to remedy the oppression by either amending the By-law to provide for some commercial owner representation on the Board, or terminating the Condominium. They also seek the appointment of an inspector to audit the books and records pursuant to s. 130 of the Act.

[6] The issues in this application are whether the relief is available to the applicants either in terms of the share of common expenses or the representation of the commercial owners on the Board. For the reasons that follow, I conclude that the application must fail insofar as the application for a reallocation of the common expenses is concerned, but that it succeeds in its

application for a declaration that the applicants' effective removal from the Board was oppressive.

The Allocation of Common Expenses

[7] The applicants submit that the allocation of the common expenses in the Declaration is unfair. First of all, they say, it renders them responsible for disproportionately more of the common expenses than is fair, and second, it effectively requires them to contribute to amenities that benefit the residential tenants or owners. While they concede that the allocation of common expenses was set out in the Declaration, they claim that they did not see it when they bought their units. Many of them are recent immigrants with varying degrees of facility in the English language and they submit that it would be unfair to hold them to an unfair allocation in these circumstances.

[8] In response, Rexdale and the Condominium submit that the allocation of common expenses is not unfair. They say that the fact that a particular owner does not use aspects of the common elements does not render that owner's liability for those common elements unfair or inappropriate. For example, a unit owner who lives on the main floor of a high rise condominium will probably pay the same share for the elevators as the owner who lives on the 20th floor. Most importantly, the respondents submit that the disclosure provisions of the Act were met, and that it is not open to the applicants to claim that they did not actually see or understand the Declaration.

[9] Schedule "D" of the Declaration of YCC 478 sets out the proportion of common expenses that each unit must contribute in a percentage:

Unit Type	**Proportions of Common Interest in Percentages (per unit)**	**Proportion of Contributions to Common Expenses Expressed in Percentages (per unit)**
Commercial	1.55556	2.0
Residential	0.888875	0.583334
Parking Spaces (for residential units)	0.00001	0.060975

[10] It is clear that, as set out in the Declaration, the contribution to the common expenses of the commercial units is greater than their interest. The contribution to the common expenses of the residential units is less than their interest. While the commercial owners feel that this is

unfair, it is clear from the case law that there is a strong presumption of validity of declarations, and that courts generally expect that unit owners should be able to rely on the terms of declarations as long as the disclosure provisions of the Act as set out above have been met.

[11] In the Ontario Court of Appeal decision of *York Region Vacant Land Condominium Corporation No. 968 v. Schickedanz Bros. Ltd.* (2006), 151 A.C.W.S. (3d) 536, 2006 CanLII 32596, the Court relied on the fact that the fee formula at issue in that case had been created before the unit holders purchased their properties. The Court of Appeal found that the fact that condominium fees favour some unit owners or others does not necessarily meant that this conduct is oppressive or prejudicial. It held that in light of the commercial realities of the condominium industry each purchaser had the option of deciding whether or not to purchase based upon the terms disclosed in the Declaration and concluded that if the unit owners could not rely upon the terms of a Declaration that is in compliance with the Act, the destabilizing effect on the industry would be significant. At para. 12 the Court stated:

> ... each purchaser in this development had the option of deciding whether or not to purchase based upon the terms disclosed in the declaration. It is not oppressive for a developer declarant to register and implement a properly disclosed declaration so long as it is in compliance with the Act and its regulations. If declarants could not rely upon the terms of a declaration which fully complied with the Act and was fully disclosed to purchasers, there would be shocking implications for the industry.

[12] In this case, as in *Schickedanz*, the common expense allocation was set out in the Declaration well before the commercial unit owners purchased their units in 1997.

[13] The commercial owners insist that it would be unfair to hold them to the allocation of common expenses in the Declaration because they never saw the Declaration when they were purchasing the property. As a matter of law it is clear that the applicants must present evidence that the disclosure terms of s. 76 of the Act were not met in order to claim that they should not be bound by the Declaration. In the absence of such evidence, it is not open to the applicants to make such a claim. There is no suggestion that they asked to see it and were refused. They all had legal counsel. Condominium law and contract law in general would be in disarray if actual notice and understanding was a condition precedent of reliance on particular provisions: see *Waterloo North Condominium Corporation No. 186 v. Weidner* (2003), 65 O.R. (3d) 108 (Sup. Ct. J.).

[14] As the respondents note, Rexdale purchased the residential units in reliance upon the Declaration and so reallocating the common expenses would be frustrate its reasonable expectations.

[15] The framework of the Condominium Act is predicated on the registration of the declaration, which then becomes, along with the Act, the core document upon which owners

and prospective owners can rely. While it is not disputed that the commercial owners pay a somewhat disproportionate share of the common expenses, I do not agree with the applicants that this alone makes the Declaration unfair and oppressive. There was no evidence before the court as to why the Declaration divided the common expenses as it did in this mixed use condominium, but it is not difficult to consider reasons why this might have been done. The 30 commercial units are all storefront, street level units and the 60 two storey residential units sit above them. The residential owners provide a ready market for services such as restaurants, laundromat, beauty salons, etc. that the commercial outlets offer. While the project may not have turned out to be as successful as the developers had hoped, this is an explanation that could well have justified the allocation of common expenses.

[16] There is, in short, no basis for the commercial unit owners' challenge to the expense allocation on the basis of the material before me.

The Board of Directors and the Commercial Owners

[17] When the commercial owners purchased their units, one of the provisions of the by-laws read as follows:

> Article 2.03 Election and Term. Immediately after the passing of this by-law the Declarant may appoint directors who shall hold office until successors are elected at a meeting called pursuant to Paragraph 4.01. Directors shall be eligible for re-election. Subject to Paragraph 4.07, at the first meeting of the members held to elect directors, in priority in accordance with the number of votes cast for each director two directors shall be elected by the residential unit owners for a term of one year, two directors shall be elected by the commercial unit owners for a term of one year and one director shall be elected by all unit owners for a term of one year, provided that such director must receive a majority of the votes cast by each of the commercial and residential unit owners. [...]

Another article of the by-law provided for a greater weighting of votes to be accorded to holders of commercial units:

> Article 4.07 Right to Vote. At each meeting of members, every member who is entered on the register as an owner or has given notice to the corporation in a form satisfactory to the chairman of the corporation in a form satisfactory to the chairman of the meeting that he is an owner, shall be entitled to vote. [...] *The vote of each member or mortgagee shall be equal to four votes per residential unit and seven votes per commercial unit.*

[18] The combined effect of these provisions was to establish a mixed use condominium in which the fact that the commercial owners were significantly outnumbered by the residential numbers was counterbalanced by these two provisions, which ensured there was balance on the Board of Directors and that the weighting of the votes meant that the commercial owners held a total of 210 votes while the residential owners held a total of 240. The respondents' legal

expert, Mark Freedman, acknowledged that the purpose of the stipulated board composition was to ensure that the commercial owners had an equal say in the management of the corporation.

[19] A prospective commercial owner might reasonably rely on the combination of these provisions with the common expense allocation and see them adding up to a sensible and commercially feasible package. One of the elements of this package, however, was implicitly repealed by an amendment to the *Condominium Act* in 1998. Section 51(2) now stipulates that "[a]ll voting by owners shall be on the basis of one vote per unit": *Condominium Act, 1998*, S.O. 1998 c. 19.

[20] In the meantime, the applicants continued to hold two positions on the Board of Directors and the residential owners also held two, as provided for by article 2.03. For some time, however, there had been no director in the fifth position because the two groups were never able to agree on a fifth director. This meant that, while the Board dealt with operational issues and emergencies, deadlock became the order of the day as far as planning issues and repair issues, with each interest blocking the wishes of the other. While Mr. Bergman's view has been that the commercial owners were holding him hostage while the building deteriorated, the commercial owners were becoming increasingly dissatisfied with the situation, which they believed required them to "subsidize" the residential owners. They have expressed the view that Mr. Bergman was unwilling to negotiate. In 2005, and no doubt frustrated at the continuing deadlock, Mr. Bergman had a meeting of the owners called and, by majority of the owners on a "one vote per unit" basis as mandated by the Act, removed the two commercial directors. Since that time, the Board is composed of Mr. Bergman and his two appointees who are his lawyer and his accountant respectively, whom he pays to act as Directors. Mr. Bergman did offer to allow two commercial owners to sit on the Board, but only as long as he has the majority. Under cross-examination, Mr. Bergman admitted that decisions are made informally and that, essentially, he makes all the decisions.

[21] Was Rexdale's conduct in removing the commercial units from the Board oppressive within the meaning of s.135 of the Act?

[22] Section 135 allows a unit owner to apply to the court for relief from conduct that is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant. The section came into effect in 2001. While this is a new concept for Ontario condominium corporations, Canadian courts have dealt with the oppression remedy for many years in the context of corporate law. Corporate law principles regarding oppression are, therefore, applicable in determining what constitutes conduct that is oppressive, unfairly prejudicial or unfairly disregards the applicant's interests in the context of condominium law: see *Niedermeier v. York Condominium Corp. No. 50* (2006), 149 A.C.W.S. (3d) 708, [2006] O.J. No. 2612 (Sup. Ct. J.).

[23] In the corporate law context, oppressive conduct requires a finding of bad faith, while conduct that is unfairly prejudicial or that unfairly disregards the interests of the applicant does

not: see *Brant Investments v. Keeprite Inc.* (1991), 3 O.R. (3d) 289 (C.A.) at 305-306. Oppressive conduct has been described as conduct that is burdensome, harsh and wrongful. Unfair prejudice has been held to mean a limitation on or injury to a complainant's rights or interests that is unfair or inequitable. Unfair disregard means to unjustly ignore or treat the interests of the complainant as being of no importance: see *Niedermeier, supra*, and *Consolidated Enfield Corp. v. Blair* (1994), 47 A.C.W.S. (3d) 728, [1994] O.J. No. 850 (Gen. Div.) at para. 80. Loeb suggests that in the context of condominium law:

> ..."unfairly prejudicial" more appropriately describes deception, or different treatment for what may seem to be similar categories, whether financial or otherwise. "Unfairly disregards," however, may more accurately describe an alleged failure to take into account a legitimate minority interest or viewpoint: see Audrey M. Loeb, *Condominium Law and Administration*, looseleaf (Scarborough, Ontario: Thomson Carswell, 1998) at 23-23.

[24] When determining whether conduct falls within the meaning of s. 135, the court must be mindful that the oppression remedy protects the reasonable expectations of shareholders or unit owners. Reasonable expectations should be determined according to the arrangements that existed between the shareholders or unit owners of a corporation: see *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.). In addition, the court must examine the cumulative effect of the conduct complained of. In *Blue-Red Holdings Ltd. v. Strata Plan VR 857* (1994), 42 R.P.R. (2d) 49 (B.C.S.C.) Dorgan J. looked at the cumulative effect of the conduct complained of, and concluded that the conduct was unfairly prejudicial because it resulted in substantial and significant changes that affected only the commercial owners in a mixed use condominium. Commenting on this case, Loeb suggests that where a proposed change or course of conduct in management dramatically alters the relationship between commercial and residential unit owners, courts are likely to grant a remedy to the aggrieved minority interest unless it can be demonstrated that the proposed change or the conduct itself represents an attempt to balance the competing economic interests of the two groups.

[25] In this case, Rexdale's conduct was unfairly prejudicial to and unfairly disregarded the interests of the commercial unit owners who sat on the Board. This is a mixed use condominium, whose viability depended on establishing a governance framework within the Act that served the needs and interests of both the commercial and residential unit owners with some sort of balance. The Declaration clearly contemplated a relatively level playing field between the commercial and residential owners. Indeed, Mark Freedman testified that the purpose of the stipulated board composition was to ensure that the commercial owners had equal participation in the management of the corporation. Under cross-examination, Mr. Bergman admitted that when he purchased the residential units in November 2003, he understood that there would have to be agreement between commercial and residential groups in running the condominium corporation.

[26] The amendment of the "one unit one vote" provision eliminated an important part of the balance for the commercial owners, as their protection in terms of weighted voting was

gone. This left their participation on the board as the only effective way for them to take part in the management of the condominium. In these circumstances, it was reasonable for the commercial unit owners to expect that they would continue to be represented on the Board in order to maintain their ability to participate in the management of the condominium.

[27] The removal of the commercial unit owners from the Board not only limited their participation on the Board, but has amounted to their complete disenfranchisement and a dramatic alteration of the relationship between the commercial and residential unit owners. In my view, such an outcome is unfair or inequitable since it flouts the reasonable expectations of the commercial unit owners and is very much at odds with the governance framework contemplated by the Declaration.

[28] In addition, in removing the commercial unit owners from the Board, Mr. Bergman unfairly disregarded their interests. Removing them may have been in the interests of the residential owners but it was virtually unanimously opposed by the commercial owners. Mr. Bergman's offer to allow two commercial unit owners to sit as directors provided that he has the majority of positions is not acceptable as it amounts to a unilateral decision.

[29] It is important to note that balancing the interests of the commercial and residential owners in terms of representation on the Board could have been achieved by means other than the weighting of votes as was done originally. There could have been, for example, provision for a minimum number of seats to be held by commercial\residential unit owners respectively although all unit holders would vote for all. This would likely have happened had the "one unit one vote provision" been in force at the time the Declaration came into being.

[30] The applicants seek a termination of the condominium corporation. The respondents oppose this relief. The applicants submit that there is no point in trying to make the original formula work as it has proven to be unsuccessful so far, but also suggest that Rexdale has been unwilling to negotiate with them. In the alternative, the applicants seek an order to amend the by-law to provide for some commercial owner representation on the Board.

[31] Having found that the removal of the commercial unit owners from the Board was unfairly prejudicial and unfairly disregarded the commercial owners' interests, a declaration that this conduct was oppressive within the meaning of s. 135 is appropriate. In my view, the most appropriate remedy in these circumstances is an order that the existing by-law 2.03 be enforced. Section 135(3) gives the court broad remedial power to make any order the judge deems proper upon a finding that the conduct complained of is oppressive. However, this power is likely limited by s.136, which implies that the remedies available may be limited by specific provisions in the Act, and the provisions in the Act that set out specific requirements for the enactement, amendment or repeal of by-laws. Loeb suggests that by virtue of the absence of statutory authorization in s. 136, the Act precludes the court from varying the written terms of condominium by-laws. Loeb also notes that such limitation on the court's remedial power is in keeping with the purpose of s. 135, which is to control conduct that is oppressive: see Loeb, *supra,* at 23-13. As it is questionable whether the court has the power to

amend the by-law, I decline to grant this relief. However, s. 136 does not limit the court's ability to control oppressive conduct by directing the condominium to enforce a by-law. By-law 2.03 provides for commercial owner representation on the Board by directing that two directors be elected by the residential unit owners, two directors be elected by the commercial unit owners and a fifth director be elected by all unit owners. The enforcement of this by-law would likely restore the commercial owners' participation on the Board and thereby remedy the oppression they have suffered. In my view this is the least intrusive and most appropriate remedy in the circumstances of this case.

[32] The remaining issues in this application relate to the request for the appointment of an inspector. In my view, this is not necessary given my order concerning the reinstatement of commercial representation to the Board. The other issues raised relate either to the applicants' perception of injustice by virtue of the disproportionate common expense allocation, which I have found to be unjustified, or by virtue of its continuing suspicions about the manner in which the condominium is being managed in light of their removal from the Board, which I have found to be oppressive.

Harvison Young J.

Released: August 7, 2007

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