Case Name:

Wentworth Condominium Corp. No. 12 v. Wentworth Condominium Corp. No. 59

Between
Wentworth Condominium Corporation No. 12,
Applicant/Plaintiff, and
Wentworth Condominium Corporation No. 59,
Respondent/Defendant

[2007] O.J. No. 2741
Court File No. 03-10516

Ontario Superior Court of Justice
D.S. Crane J.

Heard: April 2 and 3, 2007 and reserved for decision.
Judgment: July 6, 2007.
(37 paras.)

Counsel:

Izaak De Rijcke, counsel on behalf of the Applicant/Plaintiff.

D. Collins counsel on behalf of the Respondent/Defendant.

¶ 1 **D.S. CRANE J.**:— This application came to court through an order directing a trial of an issue. The issue for the parties is who is to do the critical repairs to a storm sewer system.

¶ 2 The best way to understand the issue is through the factual history.

¶ 3 The documentary record relevant to this proceeding commences with the registration of a Site Plan Agreement between Frank Long and the Municipal Corporation of the Town of Dundas, (hereinafter "*Dundas*"), registered as Parcel Plan 1, Section M-102, on 28 March, 1973 (Exhibit 1, Vol. 1, Tab 1). This Agreement led to a Site Plan for development. The Plan has not been made an exhibit in this action. From the oral evidence it is clear that Mr. Long, through a corporation, Alliance Building Corporation Limited, (hereinafter "*Alliance*") developed two adjacent residential condominium housing projects.

¶ 4 This development was firstly on Part 1 of the subject lands in the period 1973-1974 with the Declaration establishing the plaintiff Condominium Corporation, registered in 1975. The project was in accordance with a plan prepared by Peter Ashenhurst's predecessor and father, H.B. Ashenhurst, land surveyors, dated October 31, 1974 (Exhibit 1, Vol. 1, Tab 2). This plan shows as Part 2, the subject easement; and undefined in the plan is Part 3, the lands that subsequently became those of the defendant, Wentworth Condominium Corporation No. 59.

¶ 5 Exhibit 1, Vol. 2, Tab 17 is Plan 62R-1469, registered September 27, 1973. In this Plan of Survey, what is now Condominium No. 12 is Part 1; what is now Condominium No. 59 is Part 3, and the lands of the easement and rights to be discussed in these Reasons, is shown as Part 2.

¶ 6 Exhibit 1, Vol. 1, Tab 16 is a Plan of Survey which sets out the units constructed and their location in Part 3 together with the easement, described as Part 2, Plan 62R-1469. This Plan and a Declaration, were registered on July 25, 1977, establishing Wentworth Condominium No. 59.

¶ 7 I find on all the evidence, the sequence of events is as follows. During the same period that Condominium Corporation No. 12 was created with the registration of a Declaration and Plan on 3 March 1975, the development of Phase 2 (Condominium 59) was proceeding. Among other things, this involved the filling in of the floodplain or overflow area and an altering of the slope of the lands in Part 3. This activity resulted in correspondence to Alliance from the Hamilton Region Conservation Authority (hereinafter "*the Conservation Authority*"), on the basis of a violation by Alliance.

¶ 8 After the violation was discovered, negotiations took place for a solution that would allow Alliance and related companies, to construct the Phase 2 development which became Condominium Corporation No. 59. Phillips Engineering was hired by the developers. A plan was created that increased the size of the buildable lands of Part 3 to accommodate more units. The solution reached was Phillips Engineering Plan, Exhibit 7, an undated plan described as Job No. 75087 titled "*Proposed Channel Improvements at Ann Street, Dundas - Valley Height Estates*". This plan provided for the relocation of the natural water flow from Part 3 into a defined channel styled as Ann's Creek, within an easement to be created, entirely on Condominium No. 12 land.

¶ 9 On the evidence of Mr. Ashenhurst, which I accept as factual, Frank Long, now deceased, on behalf of Condominium No. 12, granted an easement and rights to Alliance, Duffbrook Management Ltd. and Melanie Holdings Ltd. The document is dated 28 February, 1975.

¶ 10 It is worth noting that Mr. Long was the directing mind of all of the corporate persons. "*Self-help*" was the developer's first recourse, when that failed, the easement was granted for the purpose of satisfying the Conservation Authority and thereby permitting the Condominium 59 development. The easement was created by Frank Long for Frank Long. The present beneficiary is the successive owner of Part 3, Condominium No. 59.

¶ 11 The Phillips Engineering solution was implemented by land reconfiguration and construction of storm sewers with "appurtenances" (including a weir structure). The storm waters of Condominium No. 59 exit its land by way of this system.

¶ 12 The evidence is that the storm sewer system on the easement lands has not been maintained or repaired since the works were constructed in 1975. The fact is that there is now a serious risk of collapse of the structure, with risk of flooding in times of heavy run-off and the risk of erosion and damage to the course of the waterway, particularly, the undermining of the structural integrity of a number of the units of Condominium No. 59.

¶ 13 The owners of the Condominium No. 59 units have had the benefit of the Condominium No. 12 lands for approximately 30 years without any expended cost. The structures are in urgent need of repair and maintenance. Once done, one might reasonably conclude, another 30 years of enjoyment will ensue. There is no option to Condominium No. 12 to return the situation to the pre-development status of the Condominium 59 lands.

¶ 14 The situation here is made unique by condominium law and the public interest exercised through the Conservation Authority. The servient tenement is not permitted, in law, to withdraw the easement allowing the water to flood out of the sewers to erode the lands of Condominium No. 59 and possibly create a nuisance to down stream landowners.

¶ 15 The Easement Agreement is found at Exhibit 1, Vol. 1, Tab 7, I quote:

> *An easement and rights in favour of the owner from time to time of that part of Block B, Plan M-102 in the Town of Dundas, in the Regional Municipality of Hamilton-Wentworth, shown as part 3 on a Plan of Survey or Record in the Land Registry Office at Hamilton, filed as No. 62R-1469, on an under that part of Block B, Plan M102, in the said Town of Dundas, shown as Part 1 on a Plan of Survey of Record filed as Number 62R-2221, to enter, construct, maintain, inspect, alter and repair a storm sewer or storm sewers, including all appurtenances thereto, on and under all and singular that certain parcel or tract of land and premises in the Town of Dundas, in the Regional Municipality of Hamilton-Wentworth, being part of Block B, according to registered Plan Number M-102, shown as Part 1 on a Plan of Survey or Reference filed as Number 62R-2221, and for the servants, agents, contractors, and workmen of the transferee to enter with machinery, material, vehicles, and equipment necessary for the use of this easement.*

¶ 16 I find that the words create ambiguity. I look to the intention for the parties (really one party with conflicting interests) at the time the Agreement was made.

¶ 17 There is no rational basis to create "an easement and rights" to construct, maintain, inspect, alter and repair storm sewers unless there was an intention (indeed the need) to do so. Once the predecessors to Condominium No. 59 constructed the storm system the concomitant action of inspection, maintaining etc, were activated. The title holders of Part 3 cannot in law and in equity choose the construction rights and reject the maintain and repair burden. The facts here are that the granting of a benefit or easement (the storm water system) was conditional on the grantee assuming the positive obligations (to inspect, maintain and repair) and accordingly the obligations are binding (per paragraph 85 re: Amberwood, infra).

LEGISLATION

¶ 18 The history is not complete without mention of the development of the condominium legislation. A new body of statute law was developed in the 1960s and 1970s in Ontario energized by a public policy decision that condominium developments would provide low cost housing in the face of the high cost of land in urban areas.

¶ 19 The public purpose for enacting legislation was initially to facilitate condominium development. After careful study by the Ontario Law Reform Commission, numerous problems with relying on the common law as a means for encouraging condominium development were identified and legislation was recommended as a simple and comprehensive framework for development. The Bill which would eventually be enacted in 1967 [See Note 1 below] was introduced into the Ontario Legislature as follows:

> The concept of such a law ... is that property may be divided into individually owned units with common elements that are owned in common by all the owners of the units with an administrative scheme that permits these owners to manage their property. The

> desirability for such a law arises from the high cost of land and the natural appeal of ownership. It would permit new and effective arrangements for cooperative ownership and allow a great flexibility in the financing of those arrangements, with resulting lower cost.
> ... I feel that a condominium law in Ontario would have a material benefit for those engaged in such development within our province. [See Note 2 below]

Note 1: S.O. 1967, c. 12.

Note 2: Ontario, Legislative Assembly, Legislature of Ontario Debates Official Report (22 March 1967) at 1631 (Hon. Mr. Wishart).

¶ 20 Undoubtedly this distinct, relatively new body of law was enacted for the public purpose of facilitating the development of affordable housing. Subsequent to its enactment, however, several amendments were necessitated to address the relationship between developers and purchasers.

¶ 21 One such amendment involved the legislated right of a developer to contract and convey easements and other rights in land on behalf of the Condominium Corporation. This was particularly problematic where the developer owned both the Condominium Corporation situated on the servient land as well as the dominant land adjoining it. The amendments to the Act to address this issue came about with the passage of *An Act* to *amend The Condominium Act*, S.O. 1974 c. 133. The substance of these changes was carried forward in the 1978 version of the *Condominium Act*.

Audrey Loeb Burns and Bradley N. McLellan aptly summarize these changes as reflected in the 1978 legislation:

> Section 9(1) of the Act allows the condominium corporation to grant or transfer an easement by special by-law. Section 38(2) provides that a grant or transfer of an easement to the corporation is as effective as if the corporation owned land capable of being benefited by the easement. This is designed to enable a developer who owns land adjoining the condominium property, which he also owns, to create an easement for the benefit of the corporation or to which the corporation is to be subject, even though there is a unity of ownership. [See Note 3 below]

In addition, the amendments made any such grant or transfer of an easement binding on all owners: See s. 4 of *An Act* to *amend The Condominium Act.*

Note 3: Audrey Loeb Burns and Bradley N. McLellan in their then current text entitled *Condominium The Law and Administration in Ontario* (Toronto: 1981, Carswell). See also: Land Titles Amendment Act, 1980 (Ont.), c. 49 and the Registry Amendment Act, 1980 (Ont.), c. 50.

¶ 22 Commensurate with amendments facilitating development were those to protect purchasers. The 1978 Bill to revamp the legislation had the following explicit objectives:

1. Providing more protection to consumers, and
2. Improving the processes by which condominium corporations and owners manage their affairs. [See Note 4 below]

Note 4: Ontario Legislative Assembly, Official Report of Debates (Hansard), 75 (1 June 1978) at 3013 (Hon. Mr. Grossman).

¶ 23 The facilitative role of the legislation tempered by the theme of consumer protection has characterized the evolution of condominium legislation. It is a balance between protection of purchasers and the commercial realities of the condominium industry. In *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1992), 10 O.R. (3d) 120 (C.A.) Robins J.A. stated:

> While I may generally agree with the learned judge's critique of the legislation, I am unable to accept his approach to the current disclosure requirements. In my respectful opinion, this approach fails to construe s. 52 in a manner that properly balances consumer protection and the commercial realities of the condominium industry and, if adopted, would require a disclosure document incompatible with the underlying aim of the section.

See also *Carleton Condominium Corp. No. 11 v. Shenkman Corp. Ltd.* (1985), 49 O.R. (2d) 194 (H.C.J.); *Carleton Condominium Corp. No. 441 v. Carleton Condominium Corp.* No. 441 [1998] O.J. No. 4463 (C.A.); *Ward-Price v. Mariners Haven Inc.* [2001] O.J. No. 1711.

¶ 24 From a review of the legislation it is clear that condominium law is relatively new, distinct and characterized by a dominant public purpose of balancing the interests of development with those of the purchaser. The legal authority available to the incorporator of a condominium corporation by the Ontario Legislature to grant or transfer easements binding on future unit owners, facilitated the development of condominiums. However, to protect purchasers, this power carries with it the duty to act in good faith in the best interests of all of the unit owners.

¶ 25 The duty is distinct from a fiduciary duty recognized where agreements of purchase and sale have been executed. See: *York Condominium Corp. No. 167 et al. v. Newrey Holdings Ltd. et al.* (1981) 32 O.R. (2d) 458 (C.A.). It is also distinct from the situation where the developer is negotiating with (and not partially on behalf of) prospective purchasers. In that situation there would be no such duty in the pre-contractual phase. See: *Peel Condominium Corp. No. 505 v. Cam-Valley Homes Ltd.* [2001] O.J. No. 714 (C.A.).

¶ 26 In addition to the aforementioned duty of the developer, I obtain guidance on the interpretation of contracts entered into with reference to condominium legislation from the decision of *York Condominium Corporation No. 59 v. York Condominium Corporation No. 87* (1983), 42 O.R. (2d) 337 (C.A.). In that case the Court of Appeal dealt with the issue of maintenance and repair obligations of adjacent condominium buildings. The Court highlighted the distinctness of condominium arrangements and after referencing the Act stated:

> 11 As far as possible and with due regard for the particular mutual covenants of the individual owners, the Courts should bring a broad and equitable approach to the resolution of their problems.
> 12 Although this case does not deal with individual condominium owners within a

> single condominium, it is concerned with the relationship between two condominium corporations which form integral parts of a composite plan for condominium living. The development plan contemplated the mutual enjoyment and use of the pool by the occupants of both condominium corporations. The mutual enjoyment of a facility calls for a mutual obligation of repair.
> 13 The concept of repair in such a situation should not be approached in a narrow legalistic manner. Rather, the Court should take into account a number of considerations. They may include the relationship of the parties, the wording of their contractual obligations, the nature of the total development, the total replacement cost of the facility to be repaired, the nature of the work required to effect the repairs, the facility to be repaired and the benefit which may be acquired by all parties if the repairs are effected compared to the detriment which might be occasioned by the failure to undertake the repairs. All pertinent factors should be taken into account to achieve as fair and equitable a result as possible.

THE NATURE OF THE EASEMENT AND RIGHTS

¶ 27 The early drawings, as referred to in this action, describe the waterway as "the creek" without a name. It was in effect, a small natural water course, which flowed from neighbouring lands providing drainage, taking a natural course through these undeveloped lands. With the proposed development of Condominium No. 59, it was necessary to provide for drainage of surface waters, around, into and along the subject waterway. In addition, as the stream was straightened to provide for a new setback, head of slope, the flow of the waterway would be increased in velocity. Phillips Engineering developed a plan of relocation and construction to provide for the safe conduct of the drainage waters originating from the north of Condominium No. 59 and from Condominium No. 59.

¶ 28 I find that the maintenance and repair of those works, which were constructed by Condominium No. 59's predecessor in title, under the easement, each and several, are the storm sewers and appurtenances thereto described in the grant of easement. I find also the works are those structures within the easement. For greater clarity, this includes the weir.

¶ 29 This case raises the issue of determining the relationship between the parties as successors to an easement created for the benefit of one of the parties by a common predecessor. This involves the discovery of the true intent of the registered agreement in the contextual circumstances at the time of the creation of the easement.

¶ 30 I find that in 1975, Frank Long, as the directing mind of Condominium Corporation No. 12, and as the directing mind of the development companies, the predecessor in title and the creator of Condominium Corporation No. 59, decided to take a property interest from Condominium Corporation No. 12 and grant it, through his development companies, to the Condominium Corporation to be formed on the second portion of the development lands so as to create a viable second condominium corporation.

¶ 31 Under the subject agreement, a water course was rerouted onto the lands of Condominium No. 12, creating more buildable land for what became Condominium No. 59. I find that all the benefit went to Condominium No. 59; there was no sharing of benefits. Condominium No. 59 has enjoyed the benefit of the easement for over thirty years to date. Now the structures require maintenance and repair, which when done, will benefit Condominium No. 59 for many years into the future. Declaring a burden of repair on Condominium No. 12 would not achieve the fair and equitable result as mandated in *York Condominium Corporation No. 59 v. York Condominium Corporation No. 87, supra.*

¶ 32 I find on the interpretation of the agreement, that the provision for No. 59 to enter onto the easement lands of No. 12 to effect maintenance and repairs was to provide the means to do what the creator of the easement intended, namely that No. 59, as the beneficiary of a storm water system, controls the process of dealing with the Hamilton Conservation Authority and other public bodies. The grant of easement and rights was in law conditional on the owners of the dominant lands keeping its storm water system maintained and in repair.

¶ 33 The facts of this case are clearly within the benefit-burden exception to the rule in *Austerberry v. Oldham Corp.* (1885), 29 Ch. D. 750 (C.A.). Under the analysis in *Halsall v. Brizell* [1957], All ER 371, *Ives Investments Ltd. v. High* [1967], All ER 504 and *Tito v. Waddell* (No. 2) [1977], Ch. 106 as recognized in law by the Ontario Court of Appeal in *Durham Condominium Corp. No. 123 v. Amberwood Investments Ltd.* 58 O.R (3d) 481 at para. 126 (although distinguished on its facts from the case at bar).

¶ 34 The defendant's storm waters continue to flow into the covenanted sewer - the benefit-burden exception is inextricably linked.

¶ 35 It is beyond speculation that had Mr. Long been asked in 1975; who was to keep the system in repair, his reply would be the beneficiary, i.e., the dominant tenement. That is the only answer consistent with his best interest duty to Condominium No. 12 and the benefit he intended to convey to Condominium No. 59 as his corporations's successor in ownership.

JUDGMENT

¶ 36 A declaration will issue in accordance with these findings that the defendant, as owner of the Part 3 lands, has the obligation to inspect, maintain and repair the storm sewer system.

¶ 37 Should the parties be unable to resolve the issue of costs of this action, counsel will deliver written submissions within 60 days of this day.

D.S. CRANE J.

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