SUPREME COURT OF YUKON

Citation: *Whitehorse Condominium Corporation No. 95 v. 37724 Yukon Inc*., 2013 YKSC 4

Date: 20130122
S.C. No. 12-A0110
Registry: Whitehorse

Between:

Whitehorse Condominium Corporation No. 95

Petitioner

And

37724 Yukon Inc.

Respondent

AND

S.C. No. 12-A0113

Between:

37724 Yukon Inc.

Petitioner

And

Whitehorse Condominium Corporation No. 95

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

James R. Tucker — Counsel for Whitehorse Condominium Corporation No. 95

Gary W. Whittle — Counsel for 37724 Yukon Inc.

REASONS FOR JUDGMENT

INTRODUCTION

[1] This case involves a dispute between Whitehorse Condominium Corporation No. 95 (the "Condo Corp.") and 37724 Yukon Inc. (the "Condo Developer").

[2] The Condo Corp. applies for a permanent injunction prohibiting the Condo Developer from proceeding with the construction of multi-family apartment buildings (the "apartment buildings") on Bare Land Unit 62, also known as Bare Land Unit A, which is owned by the Condo Developer, alleging that the apartment buildings are contrary to the Declaration and Plan of the Condo Corp. The Condo Developer claims that the construction is not contrary to the Declaration and the Plan, or alternatively that the Declaration and Plan should be amended to permit the construction of the apartment buildings. The Condo Developer also opposes the application for injunction on the basis of promissory estoppel and a Release and Waiver clause in the Condo Corp.'s Bylaw.

[3] The Condo Developer also applies for the termination of the government of the Condo Corp. pursuant to s. 23 of the *Condominium Act*, R.S.Y. 2002, c. 36 (the "*Act*"). This would have the effect of partitioning the Condo property thereby allowing the Condo Developer to proceed with the construction of the apartment buildings. The Condo Corp. opposes the application.

[4] This is the first occasion for this Court to interpret the *Condominium Act*. In recent years, condominium construction and condominium ownership have become popular in Whitehorse. What follows is a cautionary tale for condo developers, condo corporations and condo owners.

[5] This judgment will set out the facts, the scheme of the *Act*, the issues and my analysis. For the purpose of this judgment, Bare Land Unit 62 and Bare Land Unit A refer to the same unit in the Condo Property.

THE FACTS

[6] The facts are:

1. The Condo Developer was incorporated in 2004 to pursue a condominium housing project (the "Project"), known as Falcon Ridge. Brian Little is the president and a director of the Condo Developer and Duncan Lillico is a director.
2. The Project is located at 58 Falcon Drive, in Whitehorse, and has a legal description of Lot 137, Logan Subdivision, Whitehorse, Yukon, Plan 2005-0085 (the "Condo Property")
3. On May 16, 2005, the City of Whitehorse (the "City") issued a development permit for the construction of 30 detached residential units and noted that application fees for 87 detached residential dwellings and 48 apartments were received.
4. On June 30, 2005, the City issued a building permit for 28 new dwelling units numbered 1 to 26, 34 and 40.
5. On July 15, 2005, the City issued a development permit for the construction of 20 multiple detached dwelling units (Phase 2 of the Project).

6. On October 13, 2005, an electrical easement for the Project was registered on behalf of the Yukon Electrical Company Limited in the Land Titles Office under number 170974.

7. On October 19, 2005, the Condo Corp. was created by registration of its declaration, dated September 28, 2005 ("the Declaration"), and its plan ("the Plan"). The Declaration contains the following provision, among others:

> *11. The occupation and use of the units shall be in accordance with the following restrictions and stipulations:*
>
> *(a) Each unit shall be occupied and used only as a private single-family residence and for no other purpose; provided, however, that the foregoing shall not prevent the Declarant from completing the building and all improvements to the property*.
>
> …

8. Bylaw Number 1 of the Condo Corp., dated September 28, 2005, contains the provisions governing the Condo Corp., as well as the Rules and Regulations for owners attached as Schedule A.

9. The original Plan was entitled *Bare Land Condominium Over Lot 137* and depicted 54 individual units. There was no reference to Bare Land Unit 62 or Bare Land Unit A.

10. The original Declaration contained a Schedule 'A' that allocated the undivided interest in the Common Elements and the contribution to common expenses ("the Allocation") as follows:

Units 1 and 2	0.74%
Unit 3	60.78%

Unit 4 – 54 inclusive	0.74%

11. In November 2005, Caitlin Kerwin, the owner of Unit 19, was shown a site plan that did not contain any reference to to Bare Land Unit 62 or Bare Land Unit A. She also received an information sheet entitled “Falcon Ridge Chalet Village” providing details on the individual units.

12. The “Falcon Ridge Development Project Summary” document dated July 17, 2006, indicated that, as of April 30, 2006, 38 of the 39 Phase 1 units had been sold.

13. Amendments to the Declaration are dated September 13, 2007, May 26, 2010, and May 22, 2012. They were registered September 13, 2007, May 28, 2010 and May 22, 2012, respectively. Paragraph 11(a) remained unchanged by the amendments.

14. Amendments to the Plan were filed May 2, 2007, April 22, 2008, and May 22, 2012.

15. In the September 2007 amendment to the Declaration, signed by Brian Little for the Condo Corp., the Allocation changed to:

Units 1 – 16	0.74%
Unit 61	55.6%

Unit 61 ultimately became the location for the Clubhouse now owned by the Condo Corp.

16. On September 11, 2007, Brian Little signed a Certificate on behalf of the Condo Corp. certifying that “all the owners and persons having registered encumbrances against the units and common interests” had consented in

writing to the September 2007 amendments to the Declaration. There is no evidence that written consents were obtained. The statement "I have the authority to bind the corporation" appears under Brian Little's signature.

17. In the May 2010 amendment to the Declaration, a reference to Unit 62 appeared for the first time and the Allocation changed to:

Units 1 – 60	0.74%
Unit 61	0.60%
Unit 62	55.0%

18. On May 26, 2010, Duncan Lillico signed a Certificate on behalf of the Condo Corp. certifying that all the owners and persons having registered encumbrances had consented in writing to the May 2010 amendments to the Declaration. I find that there is no evidence that written consents were obtained. The statement "I have the authority to bind the corporation" appears under Duncan Lillico's signature.

19. On May 22, 2012, Helen Booth filed two Certificates on behalf of the Condo Corp. The first Certificate certified that the owners and persons having registered encumbrances had consented in writing to amendments to the Condominium Plan registered on April 22, 2012. The second Certificate certified that the owners and persons having registered encumbrances had consented in writing to the May 2012 amendments to the Declaration. Helen Booth deposed that these written consents were never given.

20. The May 2012 amendments to the Declaration indicated that the "units and common property … at the time immediately prior to the within amendment, encompassed the following":

> 2. DESCRIPTION OF DECLARATION. The units and common property of CC95 [Condo Corp.] consist of those units and common property shown on the originally filed condominium plan and various amendments such that, as at the time immediately prior to the within amendment, CC95 encompassed the following:
>
> a. Sixty (60) bare land units (units 1 – 60) of approximately equal size intended for use as sites for the construction of single family dwellings;
>
> b. One (1) bare land unit (unit 61) intended to house a clubhouse as recreational facility to be owned by CC95 and used collectively and in common by the owners of CC95; and
>
> c. One (1) large bare land unit (unit 62) intended to be held as vacant land until such time as the registered owner thereof commences development of such unit.

21. Brian Little signed the May 2012 amendments to the Declaration as an "Authorized Signatory" of the Condo Corp. There is no evidence to support the status of Brian Little as an "Authorized Signatory".

22. The May 2012 amendments to the Declaration stated that reference to Unit 62 would be deleted. It would instead be referenced as "Unit A, being a bare land unit". The Allocation was changed to the following:

Units 1 – 60:	0.74%
Unit 61:	0.60%
Units 63 – 68:	0.74%
Unit A:	35.76%

23. The April 2012 amendments to the Plan set out Bare Land Unit A as a large unit with no indication of what would be placed within it.

24. Prior to December 2007, full control of the Condo Corp. was in the hands of the Condo Developer and there had only been one meeting of the Condo Corp. Caitlin Kerwin was elected President in December 2007. She states that as President she was involved in "ongoing discussions" with the Condo Developer regarding the construction of apartment buildings on the Condo Property.

25. In or about the fall of 2010, Brian Little told Caitlin Kerwin that the Condo Developer controlled the majority of votes in the Condo Corp., so the Condo Developer could construct whatever it saw fit. At the time, Caitlin Kerwin was not aware of the significance of the Declaration or the Plan, or the duty of the Condo Corp. to enforce the Declaration.

26. In an email dated June 28, 2010 to Duncan Lillico, Caitlin Kerwin raised a number of concerns about the scope of the development, but also wrote:

> On the whole, the Board is supportive of the move to develop the remainder of the site and we would like to work with you to help it happen as smoothly as possible in a way that is consistent with the community we have been working hard to develop over the past 4 years.

27. On September 28, 2010, the location of the apartment buildings was the subject of discussion and agreement between Duncan Lillico, of the Condo Developer, and the Condo Board. The President and Board requested the transfer of the Clubhouse to the Condo Corp. as it was not insured by the Condo Developer and the Condo Corp. was unable to

insure until it was transferred to it. An email of Caitlin Kerwin dated November 12, 2010, attached a "summary of the points that we discussed and agreed upon at our meeting" in a document entitled "Falcon Ridge – Condo Corporation 95: Record of meeting with Duncan Lillico on September 28, 2010 re. development of remaining vacant land". The attachment included the following points, among others:

> Move multi-family building from south side of the development to west side (backing onto Falcon Drive, beside other multi-family buildings)
>
> Move chalet-style units (single family) from west side to south side to make room for multi-family buildings
>
> …
>
> Work closely with Board – keep us in the loop so we can inform residents.

28. There is no evidence that Condo unit owners and persons with encumbrances were aware of the September 2010 discussion and agreement between the Condo Developer and the Condo Board. I find that the Condo owners are not parties to the agreement.

29. Brian Little swears that from, or about, September 28, 2010, to, or about, August 20, 2011, the Condo Developer responded to the "Request" of the Condo Board by revising the Site Plan to relocate the footprints of the buildings. He referred to a "New Site Plan", which makes no reference to Bare Land Unit 62 or Bare Land Unit A.

30. On August 26, 2011, the City issued to the Condo Developer a Development Permit for a "Multiple Housing Development consisting of 26

Single Family Dwellings and 56 Condo Units". This development was to be on "Lot: Unit A".

31. On October 6, 2011, the City issued to the Condo Developer a New Building Permit for "Lot: Unit A", which refers to "Report Category: Multiple Residence", but otherwise gives no indication of apartment buildings. The Building Permit is unsigned by both the owner and the Inspector.

32. On January 30, 2012, the Condo Developer and the Yukon Electrical Company Limited executed documents required to register a new easement in the Land Titles Office. The Land Titles Office refused to register the easement.

33. On February 11, 2012, Brenda Berezan entered into a Contract of Purchase and Sale with the Condo Developer for Unit 87 for a purchase price of $340,859. The real estate agent provided her with a document containing "Phase 4" Site Information, and she was told that duplex condominiums were going to be built.

34. In the Friday, June 22, 2012 edition of the *Yukon News* publication, a photograph of Falcon Ridge had the caption:

> Falcon Ridge plans to build two rental apartment buildings at its condo complex in Logan subdivision. Along with another development downtown, these are the first large apartment buildings to be built in Whitehorse in at least 20 years.

35. On, or about, July 18, 2012, the Condo Developer commenced construction of the apartment building on Unit A.

36. In the late summer of 2012, the Condo Board was contacted by the Yukon Electrical Company Limited and asked to sign the documents necessary to permit a new easement agreement. The Condo Corp. referred this request to its lawyers.

37. Through discussions with the Yukon Electrical Company Limited, the Condo Board learned that the proposed new easement agreement was signed by the Condo Developer on behalf of the Condo Corp. in January 2012, but rejected by the Land Titles Office.

38. On August 31, 2012, counsel for the Condo Corp. advised counsel for the Condo Developer by e-mail that the Condo Developer was not authorized by the Condo Corp. to make amendments to the Declaration and Plan.

39. Brian Little alleges that on September 19, 2012, the City issued a Building Permit for "Building A – Falcon Drive, Report Category Multiple Residence". He did not attach the Building Permit as an Exhibit, so it is not possible to verify its details.

40. On October 23, 2012, counsel for the Condo Corp. e-mailed counsel for the Condo Developer advising that the Declaration restricts the occupation and use of the units to private single family residences and the proposed apartments do not comply with the Declaration. Counsel for the Condo Corp. advised that an amendment to the Declaration would require the written consent of all unit owners and persons with encumbrances.

41. By letter dated November 1, 2012, the lawyer for the Condo Corp. advised the lawyer for the Condo Developer again that the apartments were not in

compliance with the Declaration, that some unit owners may resist the development of the apartments and recommended that the Condo Developer cease construction of the apartments. The lawyer for the Condo Corp. suggested that the Condo Developer request an amendment to the Declaration.

42. On November 2, 2012, the lawyer for the Condo Corp. wrote a letter to the Yukon Electrical Company Limited regarding a proposed easement to supply power to three pedestals that would supply power to Bare Land Unit 62. The lawyer advised the Yukon Electrical Company Limited, if apartment buildings were being constructed, an amendment to the Plan would be required. He also indicated that this needed the consent of all the condo owners and further advised that some of the owners may resist the development of the apartment buildings on Bare Land Unit 62.

43. On November 8, 2012, the City of Whitehorse issued another building permit for “Unit A”, “Report Category: Multiple Residence”, consisting of a new 24-unit apartment building. This permit is unsigned by the owner and Inspector.

44. A document attached to Brian Little’s affidavit #1 as Exhibit S appears to be the only documentation that shows Building A (proposed 24 units), Building B (proposed 16 units) and Building C (proposed 16 units), all located on Bare Land Unit A.

45. On November 9, 2012, Brian Little wrote a “Without Prejudice” letter to Helen Booth, President of the Condo Corp. containing the following:

> This letter is being written to you as an individual, not in your capacity as President of Condo Corporation 95.
>
> I am writing to inform you personally that we believe that you have acted negligently and with malicious intent in your dealings regarding 37724 Yukon Inc., and that such dealings have been done by you without direction or support of homeowners of Condo Corp 95.
>
> We believe that your instructions to Jim Tucker were not supported by a mandate given to you by the members of Condo Corp 95. As a result, we intend to hold you personally responsible for any and all damages relating to the current issues.
>
> While your attorney will likely tell you that you are protected by Condominium Declarations, we will seek to classify your conduct, and potentially those of any other board members, as gross negligence and collect from you as an individual. It is not fair to put the cost of your actions upon the rest of the homeowners at Falcon Ridge when you made these decisions on your own without seeking direction from your constituents.

46. Helen Booth considered the letter to be a personal attack against her containing threats intended to stop her from fulfilling her duties as President of the Condo Corp.

47. On November 9, 2012, Brian Little also circulated a "Without Prejudice" letter to all Falcon Ridge Homeowners. This letter contained the following:

> Approximately 2 weeks ago, we at 37724, Yukon Inc. were informed by Yukon Electric that the President of Condo Corporation 95 was refusing to sign an easement agreement to provide electrical service to new units within Falcon Ridge Development. It was made clear to Yukon Electric that the only way that an easement would be signed would be if a new plan was presented that took out all reference to multi-unit stacked housing.

> This easement agreement had been given to the President of the Condo Corporation several months ago, and we had assumed it had been signed and taken care of long ago. We were shocked to hear from Yukon Electric that it wasn't signed and that the President of the Condo Corp was refusing to sign it.
>
> …
>
> The layout of the multi-unit stacked housing was changed at the request of the Condo Board in November, 2010. The Board requested that we move one of the buildings further away from the existing units in order to lessen the impact. While we had no obligation to make this change, we did so specifically at the request of the Condo Board following an in person meeting with them.
>
> The only reason a new easement is now needed is to facilitate the change that was requested by the Board in 2010. **Had the change to the site plan requested by the Condo Board 2 years ago not been made, a new easement would not now be needed.** (emphasis in original)

The letter continued on to advise that the Condo Developer would be "engaging litigation attorneys" because of Helen Booth's "unwillingness to speak with us and her demand that all communication is done through attorneys". Unit owners were told about the costs being incurred by the Developer, and further told that the conflict

> "…**also affects all those within the Condo Corporation 95. All individuals currently selling their homes or planning on listing their homes must inform all prospective buyers of this current situation.**" (emphasis in original)

The owners were urged to pressure the Condo Board to call a meeting.

48. On November 21, 2012, the Condo Corp. had a special general meeting attended by a representative of the Condo Developer. Several unit owners

raised concerns regarding the use of Bare Land Unit 62 as anything other than single-family residences.

49. On November 23, 2012, the Condo Board instructed their counsel to demand that the Condo Developer cease work on Bare Land Unit 62.

50. Counsel for the Condo Corp. wrote a letter dated November 23, 2012, to the Condo Developer to cease work on Bare Land Unit 62.

51. Based on emails received by various owners, Helen Booth deposed that the Condo Corp. is concerned that the apartment buildings will result in:

    a) Higher density;
    b) Increased vehicle traffic;
    c) Decreased revenue for current condo owners;
    d) Increased maintenance costs, repairs and liability for existing condo owners;
    e) Obstruction of natural views (mountains, trees etc.);
    f) Creation of shadows on to existing condo units;
    g) The club house being inadequate for the number of owners, and;
    h) Increased noise and air pollution.

52. At the date of this hearing on December 14 and 17, 2012, the Condo Developer continued to construct one apartment building.

53. At the time of this hearing, the Condo Property has been divided into 88 units as follows:

    a) 86 units as single family residences;

b) Unit 61, the clubhouse, which is owned by the Condo Corp., and;

c) Bare Land Unit 62, also called Bare Land Unit A, owned by the Condo Developer.

54. Brian Little says that the units owned by him and the Condo Developer currently comprise 46.12% of the voting rights. In addition, the Condo Developer holds nine Assignments of Voting Rights, representing 6.66% of the voting rights. The total voting rights in the control of the Condo Developer are 52.78%, which can be exercised in accordance with the Declaration and Bylaw of the Condo Corp.

The Amendments to the Declaration

[7] I am going to discuss the amendments to the Declaration in greater detail, as my findings of fact will be important factors when the equities are considered on the issue of whether a permanent injunction should be issued against the Condo Developer prohibiting the construction of the apartment buildings on Bare Land Unit 62.

[8] As indicated, Caitlin Kerwin purchased Unit 19 in the Condo Property in February 2006. She became President of the Condo Corp. in December 2007 and was in that position until April 4, 2012. She deposed that, during her time as President, no amendments to the Declaration or Plan were requested by the Condo Developer. She also states that no consent of owners or encumbrancers were ever sought and she was not aware of any amendments to the Declaration or Plan being registered while she was President.

[9] Caitlin Kerwin states that she was contacted in January or February 2012 by Duncan Lillico and asked to sign some documents about an easement with the City. It was the first time she had been asked to execute any documents by the Condo Developer. She discussed the documents with the Condo Board and told Duncan Lillico that the Condo Board had concerns with them and that she would not sign them.

[10] Caitlin Kerwin received an email on February 21, 2012, from Duncan Lillico indicating that they "were getting ready to put in the new Condominium Plot (*sic*) to Land Titles" and that Glenda Murrin would be giving her a call to get her signature on that. This was the first time that she was asked to sign documents relating to the Plan. The Condo Board retained lawyer Carrie Burbidge to represent them. The City of Whitehorse Easement Agreement and new condominium plan were passed on to the new Condo Board and Helen Booth on April 4, 2012.

[11] Helen Booth became President of the Condo Corp. at the Annual General Meeting on April 4, 2012. She had joined the Condo Board in February 2012, but had not previously been on a condominium Board, was unfamiliar with the *Act* and did not know what a Declaration and Plan were. When she became President, she was not provided with the Declaration or Plan for the Condo Corp. and was not aware of any restrictions on the occupation or use of condo units. She was also not aware that the Condo Corp. had a statutory obligation to enforce the compliance of Condo Unit owners with the Declaration and the Plan.

[12] Helen Booth did not become aware of the legal obligations of the Condo Corp. until her counsel reviewed the Declaration and Bylaw in August 2012 and discussed them with her in September and October.

[13] Specifically, Helen Booth and the Condo Board met with their counsel on October 17, 2012, to discuss the duties and obligations of the Condo Board of Directors under the *Act* and the Declaration.

[14] The uncontradicted evidence of Helen Booth, after assuming the office of President of the Condo Corp. on April 4, 2012, is as follows:

a) A proposed easement with the City had been discussed and agreed upon at the Annual General Meeting.

b) She attended at the office of Glenda Murrin, the lawyer for the Condo Developer, to sign the Easement Agreement. She was presented with the Easement Agreement and a certificate stating that the consent in writing of all the condo unit owners had been obtained.

c) She states that at the same office meeting with Glenda Murrin, she was advised to sign another document which she understood to be part of the Easement Agreement. Helen Booth now understands this document was an amendment to the Plan of the condominium development.

d) Helen Booth was informed by Carrie Burbidge, then the Condo Corp. lawyer, that there had been discussions between Glenda Murrin and Carrie Burbidge about the propriety of Helen Booth signing the amendment to the Plan and the Certificate of Consent for the Easement Agreement.

e) As a result of discussions between Glenda Murrin and Carrie Burbidge, Helen Booth understood that the written consent of owners was to be obtained retroactively. This did not occur.

[15] On May 16, 2012, Brian Little attended Helen Booth's workplace to speak with her. She was unable to speak with him as she was in a meeting all day. Brian Little eventually met her after work in a bar in Whitehorse where she was having a drink with her partner. Brian Little was visibly upset and told her the following:

a) That the project was running out of money and that he was going to be out $80,000 if she did not sign the certificates within the next twenty-four hours;

b) The new owners who were trying to purchase the newly constructed units were going to lose their interest rates;

c) That he had a lot of bills to pay and without being able to transfer title to new owners he was going to be in a lot of trouble;

d) That the Condo Corp. is responsible for moving things forward and he would not know what to do if she did not sign the necessary certificate; and

e) That the Condo Developer had the majority of votes in the Condo Corp.

[16] On the same May 16, 2012 evening, Helen Booth contacted other members of the Condo Board. The Board decided that she should sign the Certificate stating that the written consent of unit owners had been obtained "because it was concerned that there would be consequences to the Board, owners (old and new) and [the Condo Developer] if it did not".

[17] On May 17, 2012, Helen Booth was advised by Carrie Burbidge, the Condo Corp. lawyer, not to sign the Certificate stating that the written consent of the condo unit owners and persons with encumbrances had been obtained. Nevertheless, Helen Booth

and Carrie Burbidge attended at the office of Glenda Murrin. Brian Little was there. Helen Booth signed the Certificate certifying that the consent of all unit owners and persons with encumbrances had been obtained for the amendment to the Declaration. She was assured that the Condo Developer would try to get retroactive consents right away.

[18] At that meeting, Helen Booth expressed her concern about signing the Certificate to Glenda Murrin and Brian Little. As a result, Brian Little signed an indemnification where the Condo Developer purported to indemnify Helen Booth for any causes of action or claims etc. relating to the signing of the Certificate in respect of the consent to the Easement Agreement with the City.

[19] On May 22, 2012, an employee from Glenda Murrin's law office came to Helen Booth's workplace with another certificate of consent, which she also signed.

[20] I find as a fact that the meetings took place with Glenda Murrin, Carrie Burbidge and Brian Little. I also find as a fact that Brian Little made the statements stated by Helen Booth. Mr. Little has not denied any of the assertions by Helen Booth with respect to the signing of the Certificate of consent dated May 22, 2012. No evidence has been provided by Glenda Murrin or Carrie Burbidge and I do not make any factual findings on statements attributed by Helen Booth to them.

THE ISSUES

[21] There are a number of issues to address:

1. Is the construction of the apartment buildings on Bare Land Unit 62 permitted by the Declaration and Plan of the Condo Corp.?

2. Did the Condo Board enter into a course of discussion and agreement amounting to promissory estoppel?

3. Can the Condo Developer rely on the Release and Waiver provision of the Bylaw to prevent the Condo Corp. and the unit owners from enforcing their statutory rights?

4. Should the government of the Condo Corp. be terminated or the Declaration and Plan be amended?

5. Should a permanent injunction be granted to prohibit the Condo Developer from constructing the apartment buildings?

6. Should there be an award of special costs?

The *Condominium Act*

[22] The *Act* sets out the following objects in s. 5:

> a) To facilitate the division of property into parts that are to be owned or leased individually. The parts are called "bare land units" which are defined as "a part of the land included in the plan and designated as a unit … without reference to any buildings". A unit is defined as a part of the land designated by the plan.
>
> b) To facilitate the division of property into parts that are to be owned or leased in common. The common elements are defined as "all the property except the units".
>
> c) To provide for the use and management of those properties, and to expedite dealings therewith. As will be seen the affairs of the condominium property are to be managed by the board of a corporation incorporated under the *Act*.
>
> d) the *Act* shall be construed in a manner to give effect to the above objects.

[23] The application of the *Act* is triggered by the registration of a condominium corporation's declaration and plan, which brings the property described in the plan under the governance of the *Act* (s. 4). This permits the registrar under the *Land Titles Act* to issue a certificate of title in the name of the corporation and separate certificates of title in the name of each owner for each unit described in the plan.

[24] Section 5 of the *Act* deals with declarations. It states that a declaration shall not be registered unless it contains a number of specified requirements, including, among other things, that it is approved as to form by the registrar and that "it contains a statement expressed in percentages allocated to the units of the proportions in which the owners are to contribute to the common expenses and share in the common interest".

[25] Under s. 5(2) there is a list of matters that may be contained in a declaration, which includes, among other things:

> (c) provisions respecting the occupation and use of the units and common elements, but no such provision shall discriminate because of the race, creed, colour, nationality, ancestry or the place of origin of any person;

[26] Significantly, to indicate the importance of the declaration, s. 5 states:

> (3) All matters contained in a declaration, except the address of service, may be amended only with the written consent of all owners, and all persons having registered encumbrances against the units and common interests.
>
> (4) If a declaration is amended, the corporation shall register a copy of the amendment either
>
> > (a) executed by all the owners and all persons having registered encumbrances against the units and common interests; or

> (b) accompanied by a certificate under the seal of the corporation certifying that all the owners and all persons having registered encumbrances against the units and common interests have consented in writing to the amendment,
>
> and until the copy is registered, the amendment is ineffective. (my emphasis)

[27] Section 6 of the *Act* addresses the content of a plan. According to s. 6(1), a plan "shall contain", among other things:

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

[28] I note that s. 6(2) states that these requirements do not apply to a bare land unit.

[29] As with the amendment requirements for a declaration, pursuant to s. 6(5), "[t]he plan may be amended only with the written consent of all owners and all persons having registered encumbrances against the units and common interests". Section 6(6) also mirrors s. 5, and requires that, when a plan is amended, the corporation register a copy of the amended plan either executed by all the owners and persons with encumbrances, or accompany the plan with a certificate certifying that all members and persons with encumbrances have consented to the amendments in writing.

[30] After establishing the importance and requirements of the declaration and plan, s. 10 of the *Act* creates the corporation without share capital, and includes the following:

> (2) The members of the corporation are the owners and they shall share the assets of the corporation in the proportions as provided in the declaration.

…

> (4) The objects of the corporation are to manage the property of the owners and any assets of the corporation.
>
> …
>
> (6) The corporation shall be regulated in accordance with the declaration and the bylaws.

[31] Section 11 states that the affairs of the corporation shall be managed by a board of directors and:

> (3) The acts of a member of the board or an officer of the board done in good faith are valid despite any defect that may thereafter be discovered in that member's election or qualifications.

[32] Section 12 of the *Act* permits the corporation to make bylaws, which may address the following areas:

> (a) governing the management of the property;
>
> (b) governing the use of units or any of them for purposes of preventing unreasonable interference with the use and enjoyment of the common elements and other units;
>
> …
>
> (g) specifying duties of the corporation consistent with its objects;

[33] Section 13 sets out the rights and obligations of each owner and the corporation as follows:

> 13(1) Each owner is bound by, shall comply with and has a right to the compliance by the owners with this Act, the declaration and the bylaws, and the corporation has a duty to effect that compliance.
>
> (2) The corporation and each person having an encumbrance against a unit and common interest has a right

> to the compliance by the owners with this Act, the declaration and the bylaws.
>
> (3) Each member of the corporation and each person having an encumbrance against a unit and a common interest has the right to performance of any duty of the corporation specified by this Act, the declaration or the bylaws.

[34] It is significant that each owner has a right to compliance by the other owners with the *Act*, the declaration and the bylaws, and that the corporation has a duty to effect that compliance. The corporation also has a right to compliance by the owners with the *Act*, declaration and bylaws.

[35] Section 24 of the *Act* permits court applications for an order directing the performance of a duty:

> 24(1) If a duty imposed by this Act, the declaration or the bylaws is not performed, the corporation, any owner or any person having an encumbrance against a unit and common interest may apply to the court for an order directing the performance of the duty.
>
> (2) The court may by order direct performance of the duty and may include in the order any provisions that the court considers appropriate in the circumstances including
>
> (a) the appointment of an administrator for any time, and on any terms and conditions, as it considers necessary; and
>
> (b) the payment of costs.

[36] Section 23 sets out the conditions required to terminate the government of the property by application of an interested party under the *Act*. I will set out this section under the issue dealing with the Condo Developer's application to terminate the government of this Condo Corp. or to amend the Declaration and Plan.

Issue 1: Is the construction of the apartment buildings on Bare Land Unit 62 permitted by the Declaration and Plan of the Condo Corp.?

[37] As a result of my finding that the unit owners of the Condo Corp. did not consent in writing to any of the amendments to the Declaration and Plan filed in the Land Titles Office after October 2005, the original Declaration and the original Plan are the documents that govern in this case. Without the written consent of the owners, s. 5(4) states that amendments to the Declaration are ineffective and s. 6(5) states that amendments to the Plan are similarly ineffective. The only buildings shown on the original Plan are those for units 1 – 54. There is no Bare Land Unit 62 or Bare Land Unit A. This unit does not exist in law.

[38] While the various references to City development permits and building permits must be taken into consideration in the application of fairness and equitable principles, it is clear that municipal approval of building plans does not replace or supersede the written consent of the unit owners required by the *Act*. See *Maverick Equities Inc. v. Condominium Plan No. 9422336,* 2010 ABQB 179. The *Act* makes no reference to municipal development permits or building permits.

[39] It is my view that because there is no Bare Land Unit in the Plan, any interpretation of the provisions of the *Act* or the Declaration with respect to the nature and use of bare land units is moot. However, counsel based their arguments around the interpretation of s. 11(a) of the Declaration with respect to the use of units, and I will address it.

[40] Counsel for the Condo Corp. points to para. 11(a) of the Declaration as prohibiting the development of multi-family units. In my view, interpreting this paragraph

involves the application of the principle of *contra proferentem,* which dictates that the least favourable interpretation should be adopted against the Condo Developer who created the Declaration and Plan. Thus, even if Bare Land Unit 62 or Bare Land Unit A were in the original Plan, para. 11(a) would apply to require that each unit on it shall be occupied and used as a private single-family residence. The Condo Developer would submit that it would be somewhat absurd for Bare Land Unit 62 or Bare Land Unit A to be constructed as a single family residence when his intention was to have apartment buildings. However, that intention or purpose of having multi-family unit apartment buildings was never expressed in the original Declaration or Plan.

[41] Arguably, the restriction applies to use and occupation of individual units, rather than the construction or development of the buildings overall. But, in my view, even that less restrictive interpretation does not permit the construction of apartment buildings containing multiple single family residences.

[42] The Plan, which is required by s. 6(1) of the *Act* to contain "the structural plans of the buildings" does not contain any building with 16 or 24 units as the Condo Developer now proposes and constructs. Section 6(2), which states that the requirements of s. 6(1) do not apply to bare land units, does not assist the Condo Developer as the original Plan did not contain a bare land unit.

[43] I conclude that neither the Declaration nor the Plan permit the construction of a 16-or 24-unit apartment building on the Condo Property.

Issue # 2: Did the Condo Board enter into a course of discussion and agreement amounting to promissory estoppel?

[44] There is no question that Caitlin Kerwin, in her capacity as President of the Condo Corp., was involved in on-going discussions with the Condo Developer about the construction of multi-family apartment buildings. These included an agreement to move the multi-family buildings from the south side of the development to the west side, which is the present location of the apartment building under construction. There is no evidence that, outside of the Board, the owners of units not controlled by the Condo Developer were consulted about this, and the Condo Developer does not argue that the unanimous consent of these owners to the relocation was in any way secured. Rather, this argument is raised as a defence to the court action of the Condo Corp. for an injunction. Should the estoppel argument succeed, the Condo Developer would still require the consent of the owners before constructing the apartment buildings.

[45] Proprietary estoppel is a form of promissory estoppel and the essential elements are described in *Eberts. v. Carlton Condominium Corp. No. 396* (2000), 136 O.A.C. 317 at para. 23 (quoting from McGee, *Snell's Equity,* 13 ed. (2000)):

> (i) An equity arises where:
>
> (a) the owner of land (O) induces, encourages or allows the claimant (C) to believe that he has or will enjoy some right or benefit over O's property;
>
> (b) in reliance upon this belief, C acts to his detriment to the knowledge of O; and
>
> (c) O then seeks to take unconscionable advantage of C by denying him the right or benefit which he expected to receive.
>
> ...

> (iv) The relief which the court may give may be either negative, in the form of an order restraining O from asserting his legal rights, or positive, by ordering O to either grant or convey to C some estate, right or interest in or over his land, to pay C appropriate compensation, or to act in some other way.

[46] In *Eberts,* the condominium development was originally described as 33 units, made up of 15 industrial commercial units and 18 storage units. Just before Eberts bought a unit, the declaration was amended to read "33 commercial units" giving each unit, including the storage units, one vote. Eberts was aware of the change. The owner of the 18 storage units agreed that, as long as it was the owner, it would not exercise more than three votes. A new owner purchased the 18 storage units and Eberts brought an application in proprietary estoppel to amend the declaration to limit the 18 storage units to three votes based on the agreement of the first owner. The trial judge granted Eberts' application, however his decision was overturned on appeal.

[47] The Court of Appeal found that proprietary estoppel did not apply, as a private agreement to limit the voting rights of an original owner could not override the express provisions of the *Condominium Act*. Finlayson J.A. stated more broadly at para. 19:

> … Private agreements cannot override the provisions of the statute and equity can only prevail over an express statutory scheme in the rarest of circumstances of which this is not one. …

[48] Reducing a unit's voting right required an amendment to the corporation's declaration. The Court found that proprietary estoppel did not apply as the representation in question was not made to Eberts, she was not misled, and her proprietary interests were not affected.

[49] In *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, a case of promissory estoppel, the Court ruled that for equitable estoppel to arise, there must be evidence that one of the parties entered into a course of negotiations which led the other to suppose that strict rights under a contract would not be enforced, and that the first party intended that the legal relations created by the contract would be altered. On the facts of that case, John Burrows routinely permitted Subsurface to make certain interest payments more than 10 days after they were due. On receiving one interest payment 36 days overdue, however, John Burrows demanded the whole amount due as the default in interest payment was more than the 10 days permitted in the promissory note. Subsurface argued that John Burrows was estopped by its earlier conduct from recovering the entire amount of the debt.

[50] Ritchie J. in dismissing the estoppel claim, stated at paras. 17 and 18 (QL), as follows:

> It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.
>
> It is not enough to show that one party has taken advantage of indulgences granted to him by the other for if this were so in relation to commercial transactions, such as promissory notes, it would mean that the holders of such notes would be required to insist on the very letter being enforced in all cases for fear that any indulgences granted and acted upon could be translated into a waiver of their rights to enforce the contract according to its terms.

[51] In *Marafioti v. Metropolitan Toronto Condominium Corp. No. 75* (1994), 39 R.P.R. (2d) 47 (Ont. Gen Div), Marafioti had entered into an agreement with his condo corporation that required a deck to be built for him by the developer. The deck did not have the required approval by vote of 80% of the owners of the other units as required by the *Condominium Act*. Marafioti applied for a permanent injunction restraining the corporation from removing the deck. The corporation applied for an order requiring Marafioti to remove the deck at his own expense.

[52] In dismissing Marafioti's application for a permanent injunction and granting the corporation's order to remove the deck, Greer J. stated at para. 11:

> … There is nothing in the Condominium Declaration that makes reference to any private arrangement …

[53] Greer J. also relied upon the following quote by Finlayson J.A. in *Carleton Condominium Corporation No. 279 v. Rochon et al.* (1987), 59 O.R. (2d) 545:

> … I do not believe that the declarant can unilaterally change the declaration, cause the corporation to change it, or excuse individual unit owners from compliance therewith. …

[54] Counsel for the Condo Developer in the case at bar submits that the Condo Corp. is estopped from enforcing the strict rights under the Declaration on the following basis:

> From, or about, September 28, 2010, to, or about, August 20, 2011, WCC95 entered into a course of negotiations with 37724 which had the effect of leading 37724 to suppose that, by acceding to the Request, the strict rights under the Declaration would not be enforced and that WCC95 and the owners would co-operate and assist 37724 in the Construction, including obtaining the New Easement and all necessary amendments to the Declaration and Plan required to complete the Construction.

[55] Counsel for the Condo Developer augments his argument by relying on the Release and Waiver contained in the Bylaw, which I will address below as a separate issue.

[56] I do not accept the estoppel submission. The Condo Corp. and the Condo Developer did not have a contract that contemplated altering the legal rights of either party. In addition, the Condo Corp. cannot override the provisions of the *Act* and amend its declaration or plan without the written consent of all the unit owners. At no point did the Condo Corp. agree to not enforce its strict rights either under the *Act* or in the Declaration.

[57] Finally, any discussion and agreement with the Condo Corp. was not an agreement between the Condo Developer and the unit owners.

[58] While estoppel can apply to override clear statutory direction, it will only do so in the rarest of cases (*Eberts*). This is not one of those cases.

[59] I conclude that the promissory estoppel claim by the Condo Developer must be dismissed.

Issue # 3: Can the Condo Developer rely on the Release and Waiver provision of the Bylaw to prevent the Condo Corp. and the unit owners from enforcing their statutory rights?

[60] As indicated above, counsel for the Condo Developer relies upon the Release and Waiver provision of the Condo Corp.'s Bylaw, which states the following:

> **Article XVI. Release and Waiver**
>
> The Owner(s) of each Unit fully release any and all part(ies), entities, partnerships, persons or corporations involved in the additional or further development, enhancement, improvement, or construction of either residential dwellings

> and other lands, structures and amenities appurtement thereto on or non-residential buildings or structures intended to service or support residential occupancy on Lot 137, Logan Subdivision, Whitehorse, Yukon Territory, Plan 2005-0085 from and against all actions, causes of action, suits, complaints, losses, costs and charges relating to such development, enhancement, improvements, or construction, save and except where wilful or grossly negligent damage has been done to the person or property of an Owner. Furthermore, each Owner waives the benefit of any law, statute, regulation or bylaw which would deviate from or conflict with the foregoing, to the Owner's benefit. (my emphasis)

[61] Section 12 of the *Act* states that the bylaws "shall be reasonable and consistent with this *Act* and the Declaration."

[62] The Release and Waiver clause releases any person involved in additional construction on the Condo Property from acts of negligence, except when wilful or grossly negligent damage has been done. The last line of the Release and Waiver simply waives the benefit of any law, statute or regulation which would conflict with the release of damage caused by simple negligence.

[63] As I read the Release and Waiver, it has no application to this court action, as it would only be involved if the Condo Developer caused wilful or grossly negligent damage to an owner. In my view, it cannot be conflated or expanded to release the Condo Developer from its statutory obligation under the *Act* to obtain written consents of the owners to amendments to the Declaration or Plan. It also cannot release the Developer from its obligation to perform other duties imposed by the Declaration or Bylaw.

[64] In any event, even if it did apply to the case at bar, the Release and Waiver does not apply to the extent that the construction of the apartment building is an intentional or wilful act.

[65] Finally, any interpretation of this provision would also require consideration of the principle of *contra proferentem* as the provision was prepared by the Condo Developer without input from the owners. Its interpretation must also be consistent with the *Act*. While it is not necessary to make such a ruling, I would doubt that the waiver of sections of the *Act* would be consistent with the statutory rights conferred in s. 24 and ss. 5 and 6 of the *Act.*

[66] I conclude that the Release and Waiver provision does not apply to this application for an injunction.

Issue # 4: Should the government of the Condo Corp. be terminated or the Declaration and Plan be amended?

[67] Although the Petition of the Condo Developer was filed after the injunction application, I am going to consider it before ruling on the injunction application, as success by the Condo Developer on termination of the government or amendment of the Declaration and Plan could render the injunction application moot.

[68] The *Act* provides not only for termination of the government of a condominium property by a vote of the owners, but also by application to court by an interested party. An interested party can also apply for a court order amending a condominium corporation's declaration or plan. The court application is governed by ss. 23(1) and (2) which state the following:

> 23(1) If
>
> (a) damage to units and common elements occurs;
>
> (b) all or part of the property is expropriated; or
>
> (c) the corporation, any owner, or any person having an encumbrance against a unit and common interest considers it advisable,
>
> any interested party may apply to the court for an order terminating the government of the property under this Act, or amending the declaration or the plan.
>
> (2) In determining whether to terminate the government of the property under this Act, or to amend the declaration or the plan, the court shall consider
>
> (a) the scheme and intent of this Act;
>
> (b) the rights and interests of the owners individually and as a whole;
>
> (c) what course of action would be most just and equitable; and
>
> (d) the probability of confusion and uncertainty in the affairs of the corporation or the owners if the court does not make an order under subsection (1).

[69] The purpose of the Condo Developer in making his application to terminate the government of the Condo Corp. is to facilitate the partition of the Falcon Ridge property into two separate condominium developments. This would permit the Condo Developer to continue the construction of the apartment buildings under a separate condominium government. In other words, the objective of the Condo Developer is not so much to terminate the government of the Condo Corp. but rather to remove the Bare Land Unit A from the control and governance of the Condo Corp. The sole requirement for making such an application under s. 23(1)(c) is that he, as an "owner, or any person having an

encumbrance against a unit and common interest considers it advisable." The Condo Developer also includes the less drastic remedy of amending the Declaration and Plan to permit the construction of the apartment buildings.

[70] I will address each of the factors set out in s. 23(2). In doing so, I will bear in mind that the principles of statutory interpretation set out in *Sullivan and Driedger on the Construction of Statutes* (Markham: Butterworths, 2002), p. 20 and *Cawley Estates, Re*, 2004 YKSC 52 apply.

The scheme and intent of the *Act*

[71] I have set out the scheme of the *Act* above. There is no doubt that the *Act* is the foundational document for condominium corporations. Because condominium owners give up certain rights and privileges associated with private home ownership, it is important that the rights, privileges and obligations of the *Act* are enforced in a fair and equitable way.

[72] This principle was expressed in another way by Cromwell J.A. (as he then was) in *2475813 Nova Scotia Ltd. v. Rodgers*, 2001 NSCA 12, at paras. 3 and 4:

> [3] … In a sense, the unit owners make up a democratic society in which each has many of the rights associated with sole ownership of real property, but in which, having regard to their co-ownership with the others, some of those rights are subordinated to the will of the majority …
>
> [4] As Oosterhoff and Rayner wisely observed, the success of a condominium depends in large measure on an equitable balance being struck between the independence of the individual owners and the interdependence of them all in a co-operative community. It follows, they note, that common features of all condominiums are the need for balance and the possibility of tension between individual and collective interests: at s. 3802.

[73] However, the will of the majority must always be assessed in the light of fairness and equity for other owners.

The rights and interests of owners individually and as a whole

[74] This factor speaks to the balancing of the rights of individual owners versus all the owners collectively. Section 24 specifically permits any owners or the Condo Corp. to apply to the court for an order directing the performance of a duty imposed by the *Act*, the declaration or the bylaws. Section 13 requires every owner to comply with the *Act*, the declaration and the bylaws, and provides them the right to compliance by other owners, as well as the right to have the corporation perform its duties under the *Act*, declaration and bylaws.

[75] It is significant that s. 24 permits the court to enforce the performance of duties under the *Act*, the declaration and the bylaws. In a very real sense, the declaration is like a constitutional document that owners and condo corporations can enforce.

[76] No owner is given any primacy based on the number of units he or she may own.

The most just and equitable course of action

[77] The just and equitable power of the court has long been exercised in the winding up of corporations under *Business Corporations* statutes. While many of the corporate applications may relate to small or privately-held corporations, or to disputes in family corporations, there are three principles that have general application. In *Rogers v. Agincourt Holdings Ltd.* (1976), 12 O. R. (2d) 386 (Div. Ct.), the court set out the following at para. 26 (QL) (quoting from *Re R.C. Young Ins. Ltd.* (1955), O.R. 598 (C.A.)):

…

> 3. As the foundation of applications for winding-up on the "just and equitable" rule there must be a justifiable lack of confidence in the conduct and management of the company's affairs.
>
> 4. That lack of confidence must be grounded on the conduct of the directors in regard to the company's business. It may rest on lack of probity, good faith or other improper conduct on the part of a majority of directors.
>
> 5. It must not spring from dissatisfaction at being outvoted in the business affairs or what is called the "domestic policy" of the company.

[78] In the *Winnipeg Condominium Corp. No 12 v. Edwardian Estates Ltd.,* (1995), 45 R.P.R. (2d) 213 (Man. C.A.), the condominium corporation had 124 less parking units than dwelling units. The owners who had parking units paid an additional fee for the privilege, which was applied to the general maintenance and administration of the condominium development. At a special meeting of the unit owners, a resolution was passed requiring the substantial repair costs to the parkade be paid by an increase in the monthly parking fees. Edwardian Estates Ltd. applied under s. 23 of the Manitoba *Condominium Act* (which is the same as s. 23 of the Yukon *Act*), for an amendment to the declaration authorizing a separate monthly parking fee.

[79] The trial judge exercised his discretion to dismiss the application to amend the declaration and the Court of Appeal agreed. At para. 17, the Court of Appeal wrote that there is “no demonstrated inequity in requiring those owners fortunate enough to have an allocated parking stall to pay for this privilege not enjoyed by all unit holders by a specific monthly fee.”

[80] In my view, the *Winnipeg Condominium Corp. No. 12* case is an appropriate application of s. 23 of the Manitoba and Yukon *Acts*. It involves an initial decision by the condo corporation to make a special assessment permitted by the *Act*, which was then considered by the court according to the four principles of s. 23. The court found the corporation's action was just and equitable.

[81] The determination of what is just and equitable necessarily involves the interests of all unit owners. In *Orr v. Metropolitan Toronto Condominium Corp. No. 1056*, 2011 ONSC 4876, Orr applied, among other things, to amend the declaration to describe her unit as a three-storey unit. The previous owner had constructed a third floor, the legality of which was contested. The court denied the amendment on the basis that it could not prefer the position of one unit owner over the rights of all the unit owners. The trial judge stated the following at para. 135:

> While the Plaintiff argues for an amendment, because she was, in essence, an innocent purchaser, that is not the only consideration for the court. In determining desirability, the Court must consider the effects of the proposed amendment on other unit owners and on the corporation as a whole. …

The probability of confusion and uncertainty in the affairs of the corporation if the government is not terminated

[82] It is not necessary to expand on this principle. The court must assess whether a refusal to terminate or amend the Declaration will result in confusion and uncertainty. It implies that there must be some uncertainty or confusion that can only be resolved by making the termination order or amending the Declaration.

Application to the facts

[83] In the context of seeking termination and an amendment to the Declaration, the Condo Developer makes the following written submissions, which I quote directly:

> 1. In interpreting and applying the legislative scheme, the Court may take into consideration the facts that 37724 and its president own 46.12% of the common elements and have the right, together, to exercise 52.78% of the voting rights.
> 2. The relief sought by 37724 is for the sole purpose of facilitating the division of the Property into parts that are to be owned or leased individually, and parts that are to be owned or leased in common, to provide for the use and management of those new properties and to expedite dealings therewith; all of which accords with the objects of the *Act*, and accords with the purpose and scheme of the applicable provisions.
> 3. There is no dispute between the parties that it is the duty of the directors to manage the affairs of WCC95.
> 4. The dispute arises as to whether the directors have complied with that duty.
> 5. Neither of the Declaration nor the Plan can be amended without unanimous consent, which, upon the evidence, cannot be achieved; and, therefore, it is only the Court which can order amendments if such are just and equitable.

6. Furthermore, the evidence demonstrates that, upon the completion of the Construction, the Buildings will contain a number of units which, upon the necessary amendments to the Declaration and the Plan, will become private single family residences.

7. Viewed in the context of this interpretation, the New Site Plan and the Construction are not contrary to section 11(a) of the Declaration; indeed, they are consistent therewith and in accordance with the Project and the Site Plan, to all of which each owner agreed upon becoming a member of WCC95.

8. In determining what is "just and equitable", the evidence of Brian Little is of assistance. He has deposed that it is the conduct of the directors and officers in regard to the business of WCC95, which led 37724 to lack confidence in the conduct and management of WCC95's affairs.

[84] I conclude in assessing all of the above factors that it is the Condo Developer who has created the confusion and uncertainty in proceeding to construct an apartment building that is clearly not permissible pursuant to the Condo Corp.'s Declaration and Plan. Rather than bringing an application to amend in early 2012, the Condo Developer engaged in subterfuge and bullying tactics to achieve the desired amendment in a manner that contravenes the consent provision of the *Act*. In trying to fulfill its duty to enforce compliance with the original Declaration and Plan, the Condo Corp. has legitimately and reasonably sought the direction of the court to resolve the matter.

[85] It is not just and equitable that the Condo Developer proceed to construct an apartment building in a manner that contravenes the *Act*. The Condo Developer

registered a Declaration and Plan in 2005. The Declaration contemplates each unit being occupied as a single-family residence. The Plan contains no indication of apartment buildings. The Condo Developer now asks the court, at this late date, to amend the 2005 Declaration to permit its commercial interests to prevail over the unit owners who purchased their units in the legitimate expectation that the Falcon Ridge project would consist of separate single-family residences.

[86] I have concluded that it would not be just and equitable, in the circumstances of this case, to permit the commercial interests of the Condo Developer to be preferred over the interests and the consents of the remaining owners.

[87] The loss of confidence alleged by the Condo Developer does not arise from mismanagement of the affairs of the Condo Corp. but rather from the action of the Condo Corp. to ensure the Condo Developer's compliance with the Declaration and Plan. The Condo Corp.'s enforcement of the *Act*'s requirement that all owners consent to amendments to the Declaration and Plan cannot provide a valid basis to terminate the governance of the Condo Corp. That application is ill-conceived and I dismiss it.

[88] The application to amend the Declaration and Plan is similarly flawed. The Condo Developer does not purport to amend the Declaration and Plan to clarify an issue of interpretation. Rather, it seeks to change the entire concept of the Falcon Ridge Project to accommodate his own commercial interests.

[89] In circumstances where the Condo Developer has attempted to circumvent the intent and scheme of the *Act,* it would be unjust and inequitable to grant such a sweeping amendment without the consent of the owners of the remaining units and I dismiss this application to amend.

[90] I conclude that the application of the Condo Developer to terminate the government of the Condo Corp. or amend the original Declaration and Plan should be dismissed. To be clear, although I have not addressed every claim for relief put forward by the Condo Developer, the Petition of the Condo Developer is dismissed in its entirety.

Issue # 5: Should a permanent injunction be granted to prohibit the Condo Developer from constructing the apartment buildings?

[91] The Condo Corp. applies for an injunction prohibiting the Condo Developer from constructing anything other than private single-family residences on Bare Land Unit 62 or Bare Land Unit A and asks that the Condo Developer be ordered to cease construction of the apartment building. The injunction sought is a prohibitive one that proposes to restrain conduct that breaches the terms of the original Declaration and Plan. The injunction sought is permanent as opposed to interim or interlocutory and amounts to a final adjudication of the Condo Developer's right to construct the building, subject of course to his ability to obtain consents of all the owners and encumbrancers under the *Act*.

[92] It is common ground between the parties that this Court has the power to grant injunctions and equitable relief in this context.

[93] Sharpe in *Injunctions and Specific Performance*, looseleaf (Toronto: Canada Law Books, 2012), at 1-2 to 1-4, states that the traditional rule is that an injunction will only be granted where damages would provide an inadequate remedy. He also states that it is not possible to define inadequacy of damages in a precise way but where

injunctions are sought to restrain interference with property rights, injunctions are the presumed remedy. Sharpe concludes that:

> A context specific determination of the advantages and disadvantages of damages on the one hand or injunctive relief on the other allows the court to select the remedy that best fits the right that is to be protected or vindicated.

[94] In the *Law of Equitable Remedies* (Toronto: Irwin Law, 2000), at p. 104, Berryman says that the claimant must satisfy three criteria before a perpetual injunction will be granted:

- There is a cause of action;
- Damages are an inadequate remedy;
- There is no impediment to the court's discretion to grant an injunction.

[95] Berryman also suggests six situations where damages are likely to be inadequate:

1) Damage to person or property that is impossible to repair;
2) Damage to an interest that is not easily susceptible to economic measurement;
3) A legal wrong that causes no financial or economic harm;
4) Where damages are ascertainable but unlikely to be recovered;
5) A threat to an interest that is so important that a substitutionary remedy (damages) is inappropriate;
6) An injury that has not yet occurred or a wrong that is continuing.

[96] The test for final injunctive relief has recently been stated in *Cambrie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396, by Groberman J.A. at para. 28:

> In order to obtain final injunctive relief, a party is required to establish its legal rights. The court must then determine whether an injunction is an appropriate remedy. Irreparable harm and balance of convenience are not, *per se*, relevant to the granting of a final injunction, though some of the evidence that a court would use to evaluate those issues on an interlocutory injunction application might also be considered in evaluating whether the court ought to exercise its discretion to grant final injunctive relief.

[97] I have already concluded that promissory estoppel does not apply to relieve the Condo Developer and the Release and Waiver is not relevant to this situation. Nevertheless, there are a number of equitable principles that counsel for the Condo Developer raises.

[98] Firstly, he submits that the Condo Developer has disclosed since 2005 that he wished to develop apartments on the Condo Property.

[99] Secondly, he has discussed the apartment buildings with the Condo Board and past President.

[100] Thirdly, he has obtained the necessary municipal development and building permits.

[101] Fourthly, he submits that the Condo Corp. does not have clean hands and has delayed its application in the context of the Condo Developer announcing his intentions as early as September 2010.

[102] In summary, counsel for the Condo Developer submits that fairness and equity require that the injunction application be dismissed.

The Cause of Action

[103] The Condo Corp. brings its application for injunctive relief pursuant to the *Act*:

> 24(1) If a duty imposed by this Act, the declaration or the bylaws is not performed, the corporation, any owner or any

> person having an encumbrance against a unit and common interest may apply to the court for an order directing the performance of the duty.
>
> (2) The court may by order direct performance of the duty and may include in the order any provisions that the court considers appropriate in the circumstances including
>
> (a) the appointment of an administrator for any time, and on any terms and conditions, as it considers necessary; and
>
> (b) the payment of costs.
>
> …
>
> (4) Nothing in this section restricts the remedies otherwise available for failure to perform any duty imposed by this Act

[104] There are two apparent breaches:

1. The Condo Developer has breached ss. 5(3) and 6(5) of the *Act* by failing to obtain the written consent of the owners to the amendments to the Declaration and the Plan.
2. In acting without these consents, the Condo Developer has breached the terms of the Declaration and Plan by constructing an apartment building on Bare Land Unit A.

[105] I am satisfied that the Condo Corp. has a valid cause of action.

Inadequacy of Damages

[106] The Condo Corp. is seeking to enforce its legal rights under the *Act.* As stated by Finlayson J.A. in *Eberts*, the rights of the parties are governed by the statute. The Condo Corp. does not seek damages and it would not be a fruitful exercise to assess some amount of damages for the unit owners who claim only their statutory right to consent to amendments to the Declaration and Plan. The unit owners purchased their

residences under the Declaration and Plan as registered with the Land Titles Office and wish to enforce their right of consent to amendments to these documents.

The Doctrine of Clean Hands

[107] Sharpe described the doctrine of clean hands at p. 1-50 as follows:

> The maxim that one "who comes to equity must come with clean hands" is colourful but potentially misleading in so far as it suggests a general power to scrutinize all aspects of the plaintiff's behaviour and refuse relief if it offends. The "clean hands" maxim is best understood as a very general catch-all phrase encompassing many discretionary factors better considered in more precise terms. By itself, it has really no analytical value, although, as will be seen, it has sometimes been employed as if it did.

[108] The equitable principle that "one who seeks equity must also do equity" would apply in a similar fashion to the Condo Developer.

[109] I do not find any particular act of the Condo Corp. or its President that would deprive the Condo Corp. from pursuing the injunctive relief. However, I will address some additional principles.

Delay

[110] The Condo Corp. may lose its right to an injunction on account of delay in asserting its claim. As Sharpe states at p. 1-38:

> … it has for long been clearly established that delay alone will not be fatal. A combination of delay and prejudice to the defendant is required to deprive the plaintiff of a specific remedy to which he or she is otherwise entitled. …

[111] In the case of *Marafioti* discussed above, the condo corporation delayed for six years in bringing an application requiring the deck to be removed. In her rejection of the delay estopping the corporation form bringing the application, Greer J. stated at para. 22:

> … There is no doubt that at first blush, the six year delay seems like an inordinate length of time to wait to bring the matter to Court. On the other hand, in my review of the facts and as I have set them out in these Reasons, it is clear that the protests began immediately upon the construction beginning. …

[112] She also stated that the characterization of the delay is within the discretion of the court and declined to consider that the delay amounted to acquiescence.

[113] Counsel for the Condo Developer submits that its intention was clear from at least 2010 when it had discussions and agreement with the Condo Board to move the location of the multi-family residences. That indicates a delay of two years by the Condo Corp. in bringing its action.

[114] Counsel for the Condo Corp. submits that the intention of the Condo Developer was never clearly stated until the construction of the apartment building was commenced on July 18, 2012.

[115] I am of the view that the Condo Board did not appreciate its legal rights under the *Act* or its obligation to consult all the unit owners about changes to the Declaration and Plan. The Condo Corp. certainly has incurred delay while retaining counsel and being apprised of these rights and duties. I also consider the fact that the Condo Developer knew that it did not have the consent of the owners and that the *Act* required this consent for any amendments to the Declaration and Plan.

[116] It is also a factor that the lawyer for the Condo Corp. advised the lawyer for the Condo Developer as early as August 31, 2012, that the Condo Developer was not authorized to make amendments to the Declaration and Plan and again on October 23, 2012, that an amendment to the Declaration was required before work on the multi-family apartment units could be undertaken.

[117] It may be argued that an injunction would cause prejudice to the Condo Developer, as he is in the course of constructing the apartment building. This must be balanced with the fact that he knew that he did not have the requisite consent for the amendments to the Plan and Declaration that created Bare Land Unit A.

[118] It is also significant, in my view, that the Condo Developer has not provided any evidentiary basis for a cost-benefit analysis other than the fact that construction has started and continues. There is no evidentiary basis for a determination of actual prejudice. The Condo Developer has incurred undisclosed costs of construction. However, these costs were incurred without an electrical easement and with the knowledge of opposition from the Condo Corp. and the lack of consent of the owners and registered encumbrancers.

[119] I note also that para. 28 of the original Declaration drafted by the Condo Developer states:

> The failure to take action or enforce any provision contained in the Act, this Declaration, the Bylaws, or any other rules and regulations of the Corporation, irrespective of the number of violations or breaches which may occur, shall not constitute a waiver of the right to do so thereafter, nor be deemed to abrogate or waive any such provision.

[120] Considering all of these factors, there is no reason to deprive the Condo Corp. of the injunctive remedy it seeks. I therefore order as follows:

1. That 37724 Yukon Inc. cease construction of the apartment building on Bare Land Unit 62 and Bare Land Unit A; and
2. That 37724 Yukon Inc. is prohibited from using Bare Land Unit 62 or Bare Land Unit A for any building or construction without the consent of all the unit owners and persons having registered encumbrances.

Issue 6: Should there be an award of special costs?

[121] Both parties have claimed special costs based on the conduct of the other. Based on my decision, I will consider whether the Condo Corp. should have special costs in these circumstances.

[122] I recently set out the grounds for special costs in *Ross v. Ross Mining Ltd.*, 2012 YKSC 18, and I will summarize the applicable principles here without reference to authorities:

1. There must be reprehensible, scandalous or outrageous conduct;
2. The word reprehensible encompasses a wide range of conduct which may include milder forms of misconduct deserving of reproof or rebuke;
3. Pre-litigation conduct may be considered.

[123] The following is a non-exhaustive list of conduct that may be reprehensible:

a. Where a party pursues a meritless claim;
b. Where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation or breach of fiduciary duty;
c. Where a party has displayed "reckless indifference" by not recognizing early that its claim was manifestly deficient;
d. Where a party made the resolution of an issue far more difficult than it should have been;
e. Where a party in a financially superior position brings proceedings to impose a financial burden on a weaker party;
f. Where a party pursues claims frivolously or without foundation.

[124] Special costs are not merely a punitive sanction based on misconduct but are intended to substantially indemnify a party.

[125] There are three aspects of the Condo Developer's conduct that are reprehensible.

[126] The first is the registration of amendments to the Declaration and Plan based upon certificates that the owners had consented in writing to the amendments. This is a flagrant abuse of the statutory permission to simplify the procedure to establish that the consents in writing have been obtained.

[127] The second and most serious reprehensible conduct is the scandalous behaviour of Mr. Little in pressuring and intimidating Ms. Booth into signing certificates regarding written consent to amendments to the Plan and Declaration. In this respect, I also note that the idea of providing an indemnification agreement as a comfort for a breach of the *Act* should be denounced.

[128] Finally, the letter of the Condo Developer dated November 9, 2012, to Ms. Booth cannot be condoned by the Court. It was clearly sent to intimidate the President of the Condo Corp. from pursuing the rights of the unit owners in court by labelling her conduct as "malicious" and "gross negligence" without the support of the owners. The threat to hold her personally responsible was clearly an attempt to intimidate.

[129] Taken together, this conduct is unquestionably reprehensible and deserving of rebuke. I order that the Condo Developer pay special costs in the form of actual solicitor and client fees and disbursements to the Condo Corp.

CONCLUSION

[130] The petition of the Condo Developer is dismissed.

[131] The petition of the Condo Corp. is granted and I make the following order:

1. That 37724 Yukon Inc. cease construction of the apartment building on Bare Land Unit 62 or Bare Land Unit A;
2. That 37724 Yukon Inc. is prohibited from using Bare Land Unit 62 or Bare land Unit A for any building or construction without the consent of all the unit owners and persons having registered encumbrances; and
3. 37724 Yukon Inc. shall pay special costs in the form of the actual solicitor and client fees and disbursements of Whitehorse Condominium Corporation No. 95.

VEALE J.