

COURT FILE NO.: 75882/05

DATE: Dec. 15, 2005

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

YORK REGION CONDOMINIUM CORPORATION NO. 968 and YORK REGION CONDOMINIUM CORPORATION NO. 1002

Applicants

- and -

SCHICKENDANZ BROS. LIMITED and YORK REGION COMMON ELEMENT CONDOMINIUM CORPORATION NO. 967

Respondents

) Jonathan H. Fine, for the Applicants

) Irving Marks and Shawn Pulver, for the Respondents

) HEARD: November 2, 2005

JUSTICE E. LOUKIDELIS

REASONS FOR JUDGMENT

[1] The applicants are the owners of the developed portion of a much larger subdivision area owned by Schickendanz. Condominium Corporation 967 owns the common elements of the subdivision consisting of a roadway referred to as a ring road.

[2] The applicants seek from Schickendanz a proportionate share of the common element expenses notwithstanding the latter wording contained in clause 1.6 of the Declaration which reads:

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“Notwithstanding the foregoing, until the Common Expense Threshold Payment Date for a Future Residential POTL is established, such Future Residential POTL shall not contribute to the payment of common expenses....”

[3] The Common Expense Threshold Date is then defined as:

“...the date that at least fifty per cent of the dwellings in such Future Residential POTL become Developed Dwellings.”

[4] The effect then it to exempt the developer from common expenses until the fifty per cent threshold is passed.

[5] There is no defined date for the passing of such threshold. Further it is entirely in the developer’s hands when that date might be reached.

[6] Although the applicants were clearly aware and accepted the exclusionary clause, such clause is contrary to the provisions of subsections 7(5) and 84 (3) of the Condominium Act 1998.

[7] The former subsection establishes the paramountcy of the Act over any Declaration. The latter subsection prohibits the exemption of an owner from its obligations.

[8] In acting as it did, Schickendanz avoided its statutory duty thereby placing an unfair burden on the applicants. If not oppressive, it was highly prejudicial.

[9] The evidence appears clear that Schickendanz at least to some degree made use of the ring road. Even if that were not so, non-usage does not exempt an owner from paying its proper share. In that regard I agree with the reasoning of Rosenberg J. set out in *York Region Condominium Corporation No. 771 v. Year Full Investment (Canada) Inc.* 10 OR(3d) 670.

[10] Respondents rightly argue that in some limited circumstances a zero percent allocation is valid, as was found in the Ontario Court of Appeal decision in *Peel Condominium Corporation No. 417 v. Tedley Homes Ltd. et al* (1997) 35 OR (3d) 257.

[11] In that case the Court found that certain suites within the condominium buildings would immediately form part of the common elements and title was to be transferred to the condominium corporation upon payment of the purchase price.

[12] That case is easily distinguished from the facts here as the zero allocation simply confirmed the reality that the developer only held title temporarily for the corporation which was the equitable owner.

[13] In the case of *Abdool et al v. Somerset Place Developments* (1992) 27 RPR (2d) 157 the Ontario Court of Appeal placed the onus on a purchaser who sought to resile from a contract for non-disclosure, to show that such non-disclosure was material and would have altered his decision. In my view that is not the issue here.

[14] I am satisfied that notwithstanding notice given by Schickendanz of the terms of clause 1.6 of the Declaration the provisions of the Act must prevail.

[15] A declaration should issue as claimed by the applicants and the offending clause in the Declaration should be deleted.

[16] Further that the owner's of all POTL's associated with York Region Element Condominium Corporation No. 967 be obliged to contribute to the common expenses in accordance with the percentages set out in Schedule "D" of the Declaration.

[17] Further that the respondents pay their past share of the common expenses owing to each applicant.

[18] The draft order appears to be in order and I have signed same.

[19] The applicants shall have their costs fixed at \$10,000.00 plus applicable GST.

JUSTICE E. LOUKIDELIS

Released: December 15, 2005