2017 ONCA 27
Ontario Court of Appeal

Middlesex Condominium Corp. 229 v. WMJO Ltd.

2017 CarswellOnt 331, 2017 ONCA 27, 274 A.C.W.S. (3d) 882

# Middlesex Condominium Corporation 229 (Plaintiff / Respondent) and WMJO Limited, Ayerswood Development Corporation Middlesex Condominium Corporation 282, Middlesex Condominium Corporation 392 and Middlesex Condominium Corporation 500 (Defendant / Appellant)

J.C. MacPherson J.A., C.W. Hourigan J.A., and B.W. Miller J.A.

Heard: January 12, 2017
Judgment: January 17, 2017
Docket: CA C60908

Proceedings: affirming *Middlesex Condominium Corp. 229 v. WMJO Ltd.* (2015), 59 R.P.R. (5th) 11, 2015 CarswellOnt 11212, 2015 ONSC 3879, L.C. Leitch J. (Ont. S.C.J.)

Counsel: F. Scott Turton, for Appellant
M. Paul Morrissey, for Respondent

Subject: Contracts; Property; Restitution

APPEAL from judgment reported at *Middlesex Condominium Corp. 229 v. WMJO Ltd.* (2015), 2015 ONSC 3879, 2015 CarswellOnt 11212, 59 R.P.R. (5th) 11 (Ont. S.C.J.), finding one defendant liable to contribute to operating and maintenance costs of private sewage system.

**Per curiam:**

1 The appellant WMJO Limited ("WMJO") appeals the declaration that it is obligated to contribute on a *pro rata* basis to the expenses incurred by the respondent Middlesex Condominium Corporation 229 ("MCC 229") to maintain and operate the sanitary sewer pumping station located at 1199 Hamilton Road. The trial judge found WMJO liable based on the principles of unjust enrichment and contract. For the reasons that follow, we dismiss the appeal.

**Facts**

2 MCC 229 is a condominium corporation created under the *Condominium Act*, 1998, S.O. 1998, c. 19, located in London ("the City"). MCC 229 is built on the same parcel of land as three condominium projects owned by WMJO. The land on which all four condominium projects are built is lower than the adjacent city street Hamilton Road. Thus the City requires the sewage from these condominiums be pumped uphill to the city sewer that runs under Hamilton Road.

3 In 1989, Trenlon Developments Corp ("Trenlon"), the owner of the parcel of land upon which all four condominium projects would eventually be built, entered into a development agreement with the City (the "Development Agreement"), which was registered on title pursuit to the *Planning Act*, S.O. 1983, c. 1. The Development Agreement required Trenlon to construct and maintain at its sole expense a sanitary sewer pumping station. The Development Agreement was binding on Trenlon's successors on title.

4 Also in 1989, Trenlon conveyed the land to Award Development Ontario Ltd. ("Award"). Prior to this deal closing, Trenlon constructed the required sanitary sewer pumping station. In March 1990, Award transferred the part of the

 

land upon which MCC 229 would be built and upon which the sanitary sewer pumping station was located to a related company, Double G Contractors Limited ("Double G").

5 In December 1990, Double G and Award entered into a "Joint Use and Maintenance Agreement" ("the Joint Use Agreement"), which was also registered on title. The Joint Use Agreement contemplated the development of one condominium project by Double G, and that three further condominium projects would be developed in phases by Award on the balance of the land. The Joint Use Agreement provided for the sharing of the sanitary sewer pumping station, and stipulated that the costs of the system would be shared *pro rata* among the properties built on the land. The Joint Use Agreement contained a provision that it would be binding on successors on title.

6 Double G developed its property, and in June 1991 registered the declaration creating MCC 229. The sanitary sewer pumping station was included as part of the common elements of MCC 229. In 1991, the balance of the parcel of land (i.e. excluding MCC 229) was lost by Award pursuant to a mortgage default. This land eventually came into the possession of WMJO, who built three condominium projects during the years 1993 to 2002. As each of these projects were constructed, they were connected to the existing sanitary sewer pumping station operated by MCC 229.

7 Since 1991, MCC 229 has managed and operated the sanitary sewer pumping station. For more than ten years, WMJO contributed its proportionate share for the costs of the sanitary sewer pumping station, in line with the Joint Use Agreement. WMJO stopped making payments after 2006, taking the position that it had no obligation to do so.

**Analysis**

8 The trial judge found WMJO liable on the basis of unjust enrichment. She held that WMJO had been enriched through connecting to the sanitary sewer pumping station operated by MCC 229 rather than building its own, and thus having no responsibility to manage the sanitary sewer pumping station or deal with contractors. The trial judge found that MCC 229 had suffered the corresponding deprivation of not receiving compensation from WMJO, and being forced to operate a sanitary sewer pumping station larger than required for its number of units.

9 WMJO cited *Amberwood Investments Ltd. v. Durham Condominium Corp. No. 123* (2002), 58 O.R. (3d) 481 (Ont. C.A.), which held that positive covenants do not run with freehold land, as establishing that there was a juristic reason for the enrichment/deprivation. The trial judge disagreed, holding that *Amberwood* was not intended to restrict a party's right, in the face of an unenforceable contract, to seek restitution on the basis of unjust enrichment.

10 On appeal, WMJO largely raises the same arguments it made at trial. We see no basis on which to interfere with the findings of the trial judge in regard to enrichment and corresponding deprivation. There was ample evidence to establish that WMJO receives the benefit of the use of the sanitary sewer pumping station, without having to pay operating or management costs. As a result, MCC 229 suffers the corresponding deprivation of increased costs for electricity, repairs and maintenance. It was also established at trial that the risk of breakdown of the sanitary sewer pumping station increases with the volume of sewage.

11 WMJO submits that the trial judge failed to properly conduct the two-part analysis of the absence of juristic reason provided for in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.). Under the first part of that analysis, the plaintiff must show that no juristic reason from an established category exists to deny recovery. The established categories include a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations. If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case for recovery. The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. Courts should have regard at this point to two factors: the reasonable expectations of the parties and public policy considerations.

12 WMJO relies on the Development Agreement and the *Ontario Water Resources Act*, R.S.O. 1990, c. O. 40, as juristic reasons for MCC 229 to bear the entirety of the costs of the sanitary sewer pumping station. We would not give effect to this submission.

13 The Development Agreement does obligate MCC 229 as successor to Trenlon to maintain the sanitary sewer pumping station. However, the Development Agreement also provided in clause 9 that the owner of each phase of development would enter into an agreement with the owners of the other phases to "provide for the joint use and maintenance of common internal driveways and services." Thus, the Development Agreement always contemplated the sharing of expenses for the maintenance of the sanitary sewer pumping station.

14 The fact that the respondent has an obligation to maintain and operate the sanitary sewer pumping station under the *Ontario Water Resources Act* is not a juristic reason for why WMJO should obtain the benefit of the system free of charge. The statute does not deal with who should be responsible for the cost of maintaining such a system.

15 Pursuant to this court's decision in *Amberwood* , the positive covenants in the Joint Use Agreement are not enforceable upon subsequent owners of the land. WMJO submits that *Amberwood* establishes a public policy rationale for not using the remedy of unjust enrichment to enforce positive covenants upon subsequent owners of land.

16 We reject this submission. An unenforceable contract is a recognized basis for granting a remedy in unjust enrichment. This court's decision in *Amberwood* does not impact on that principle. In *Amberwood* the sole issue was whether the covenant was enforceable against a successor in title. There was no issue of a benefit, and thus a remedy for unjust enrichment was neither sought nor available.

17 In light of our conclusion on the issue of unjust enrichment, it is unnecessary to consider the appellant's argument regarding the contractual basis for its liability.

18 The appeal is dismissed. The respondent is entitled to its costs of the appeal, which we fix at $9,800, inclusive of fees, disbursements, and taxes.

*Appeal dismissed.*

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