CITATION: TSCC No. 2051 v. Georgian Clairlea Inc. et al, 2018 ONSC 2515
COURT FILE NO.: CV-11-435360
DATE: 20180531

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Toronto Standard Condominium Corporation No. 2051 Plaintiff	Megan L. Mackey for the Plaintiff
– and –	
Georgian Clairlea Inc., Residences of Clairles Gardens Inc., Anthony Maida, Frank Maida, Gene Maida, Georgian Corporation, The Equitable Trust Company and Firm Capital Mortgage Fund Inc. Defendants	Jonathan H. Fine and Maria Dimakas for the Defendants
-and-	
Georgian Properties Corporation Plaintiff by Counterclaim	Jonathan H. Fine and Maria Dimakas for the Plaintiff by Counterclaim
	HEARD: April 3 and 4, 2018

Reasons for Judgment

AKBARALI, J.

Overview

[1] In this motion the parties ask me to determine the validity and amount of certain debts on a summary basis. The debts relate to the plaintiff, Toronto Standard Condominium Corporation No. 2051 ("TSCC 2051"). Although there are complicating aspects to the factual background, at its heart, the summary judgment motion seeks to determine certain matters in dispute relating to dealings between TSCC 2051 and the developer/declarant of the condominium.

Background

The Parties

[2] There are a number of defendants in this action. Georgian Clairlea Inc. is the developer of the condominium and the declarant. It owned the freehold estate immediately before the condominium corporation was created. It created TSCC 2051.

[3] Georgian Clairlea Inc. subsequently changed its name to Residences of Clairlea Gardens Inc., another defendant in this action. The claims against these defendants are stayed in bankruptcy. I will usually refer to them in these reasons as the developer and occasionally as the declarant.

[4] The defendant The Georgian Corporation is related to Georgian Clairlea Inc. The claims against it are also stayed in bankruptcy.

[5] The individual defendants, Anthony Maida, Gene Maida and Frank Maida are the directors of all three Georgian corporations and were the members of TSCC 2051's first board of directors. The claims against them are stayed in bankruptcy.

[6] The claims against the defendants Equitable Trust Company and Firm Capital Mortgage Fund Inc. have been discontinued.

[7] The plaintiff by counterclaim is Georgian Properties Corporation ("GPC"). It is the assignee of the three debt instruments that are at issue in this motion. Anthony Maida, Gene Maida and Frank Maida are directors of GPC. GPC is the moving party on this motion.

[8] A settlement agreement was reached in this proceeding. Pursuant to its terms, claims relating to construction deficiencies were hived off from this proceeding to be determined in another forum. The parties agreed the remaining issues would be determined by way of summary judgment. GPC agreed to be bound by the judicial findings against the developer and to be responsible for any costs award.

The Debt Instruments at Issue

[9] This summary judgment motion involves three financial instruments in respect of which GPC seeks a money judgment. TSCC 2051 argues that each of these debt instruments are oppressive and, among other things, complains about the level of disclosure around these instruments. It seeks an order that each of the debt instruments is unenforceable. To the extent any of the financial instruments are enforceable, it seeks relief with respect to the amount and interest owing.

[10] I describe the debt instruments and the facts relevant to them when I analyze the validity of each. At this point, it suffices to describe them generally.

[11] The first debt instrument is a vendor take-back mortgage worth $2,228,100.00 which is accruing interest at a rate of 10% per annum. This mortgage relates to the HVAC equipment in the condominium development. Originally, the developer intended to have a third party supply the HVAC equipment and lease it to the purchasers. The original agreements of purchase and sale reflected this intention. At some point, the developer decided to purchase the equipment itself and sell it to the condominium corporation in the form of service units. To pay for the service units, the developer decided to set up a vendor take-back mortgage for the purchase price (the "service unit mortgage").

[12] The second debt instrument is a vendor take-back mortgage worth $1,026,000.00 and accruing interest at a rate of 10% per annum. This mortgage relates to surplus parking units and storage units that the developer sold to TSCC and for which it created another vendor take-back mortgage (the "parking unit mortgage").

[13] The third debt instrument is a promissory note. It has a face value of $90,034.26 and accrues interest at a rate of 12% per annum. It relates to land transfer tax that TSCC 2051 was responsible for paying, but for which it did not have the money. The developer paid the land transfer tax and took a promissory note from TSCC 2051 for the principal amount of the tax.

[14] TSCC 2051 entered into each of these financial instruments when it was in the control of the board installed by the developer. A turnover meeting was held on April 12, 2010, at which time the first owner-elected board of directors took control.

[15] No payment has been made on either mortgage or on the promissory note, including when the developer controlled the condominium board.

[16] In addition to these three debt instruments, the summary judgment motion includes three smaller claims on which TSCC 2051 seeks judgment.

[17] TSCC 2051's first claim is for damages for arrears in common expenses that the developer failed to pay in the amount of $38,724.91. GPC agrees that arrears are owing but disputes the amount. GPC agrees that interest accrues on this claim on a compounded basis.

[18] TSCC 2051's second claim is for damages for a first year budget deficit under s. 75 of the *Condominium Act, 1998*, S.O. 1998, c. 19, in the amount of $16,241.00. GPC denies that these damages are owing. It argues that TSCC 2051's first year expenses include unreasonable expenses. It states that once the unreasonable expenses are excluded, there is a first year budget surplus.

[19] TSCC 2051's third claim is for damages for the developer's failure to pay money into the reserve fund as required by s. 80(5) of the *Act*, in the amount of $16,471.57. The developer agrees this amount is owing, but disagrees on the interest calculation.

[20] If successful on its motion, GPC seeks the appointment of a receiver. It argues that TSCC 2051 does not have the funds to pay the amounts owing, so a receiver is necessary. TSCC 2051 disputes this relief.

[21] GPC is the moving party on this motion. TSCC 2051 has not delivered a notice of motion. However, GPC consents to TSCC 2051 seeking the relief it seeks on this motion notwithstanding the lack of a notice of motion. The parties agree it makes sense to determine all the issues between them on a summary basis.

Issues

[22] This motion raises the following issues:

a. Is this motion appropriate for summary judgment?

b. Is the service unit mortgage oppressive? The parties raised many arguments. In my view, this issue raises the following questions:

i. Can a developer, through a revised disclosure statement, alter the terms of a signed agreement of purchase and sale?

ii. If so, was the disclosure provided adequate for that purpose or for purposes of the *Act*?

iii. What amount, if any, is owing on the service unit mortgage?

iv. What interest, if any, is payable on the service unit mortgage?

c. Is the parking unit mortgage oppressive? In my view, this issue requires me to determine the following questions:

i. Did the developer adequately disclose the parking unit mortgage for purposes of the *Act*?

ii. Were the units so overvalued that the parking unit mortgage is oppressive?

iii. What amount, if any, is payable on the parking unit mortgage?

iv. What interest, if any, is payable on the parking unit mortgage?

d. Is the promissory note oppressive or void? This issue requires me to determine the following questions:

i. Is the promissory note oppressive because the developer created it to circumvent its statutory obligations?

ii. Is the promissory note void because it was executed without a specific by-law to permit the borrowing as required by s. 56(3) of the *Act*?

iii. What amount, if any, is owing on the promissory note?

iv. What interest, if any, is owing on the promissory note?

e. What amount does GPC owe TSCC 2051 for arrears of common expenses?

f. Is there a first year budget deficit, and if so, in what amount? Answering this issue requires me to consider the reasonableness of the first year expenses incurred by TSCC 2051.

g. What interest does GPC owe TSCC 2051 in respect of the s. 80(5) reserve fund payments? The parties agree that the principal amount owing is $16,471.57.

h. Should a receiver be appointed to manage TSCC 2051's affairs?

[23] What follows is my analysis of the issues identified above.

Is this motion appropriate for summary judgment?

[24] The parties to this motion agree that summary judgment is appropriate. As part of their settlement of other issues between them, they agreed to have the issues raised in this motion determined on a summary basis.

[25] There is no doubt that there has been a culture shift in the determination of disputes on their merits, heralded by the judgment of the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87. Judges sitting in motions court may see many summary judgment motions each week. It is clear that the full appreciation of the evidence that a trial brings is not always necessary to determine a dispute on its merits.

[26] In *Hryniak*, the Court held that summary judgment is appropriate where there is no genuine issue requiring a trial. At para. 49, the Court explained that this will occur:

> …when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result. [emphasis added]

[27] In my view, for summary judgment to be an effective and proportionate way to determine a dispute on its merits, it is not enough that the facts of the case lend themselves to determination without *viva voce* evidence. Nor is it enough that the summary judgment process theoretically could meet the criteria set out by the Court in para. 49 of its decision in *Hryniak* (quoted above). The summary process actually employed must actually allow the court to reach a fair and just determination on the merits.

[28] The record in this motion comprises seven boxes. In a complex, document-heavy case like this one, counsel's assistance is invaluable and necessary to ensure that the process will allow a case to be justly determined on a summary basis. I agree with Myers J. in *Wells Fargo*

Equipment Finance Company v. Montesi Graphics Inc., 2016 ONSC 6507, at paras. 26-27, where he wrote that in the absence of a trial,

> …it is vital that parties provide the judge with a detailed, written statement of the facts with pinpoint citations to all applicable evidence.
>
> … [T]he factum is the judge's roadmap for the findings of fact that a party asks the judge to make when he or she is back in chambers writing the decision days, weeks, or even months after the oral hearing. The facts need support in the evidence and it is unhelpful at minimum, to expect the judge to plow through thick records to find the snippets of evidence supporting each particular finding that a party asks the judge to make to support the party's request for or response to judgment. It is counsel's most basic role to provide the judge with the evidence needed to support any finding being sought. This requires specific references to the evidence in the summary of facts in the factum.

[29] To this I add that, in a complex, document-intensive case, part of counsel's basic duty is to prioritize and identify what is relevant. This prioritization includes removing from the record evidence that is not relevant. If counsel seeks summary judgment, they ought to know the theory of their case and be able to identify the facts that the court must find, and the basis for those findings in the evidence. There is no room in an efficient summary judgment process for burdening the court with irrelevant material. It leaves more room for error. It is more time-consuming and requires the parties to wait longer for reasons. It costs the parties too much money. It leads to needless waste of environmental and judicial resources. It is the antipathy of the streamlined, proportionate, cost-efficient process that the Supreme Court of Canada was talking about in *Hryniak.*

[30] As it happened, in this case I had access to the material for some time because I seized myself of this motion after dealing with GPC's motion to strike TSCC 2051's factum in July 2017. Often, however, the judge hearing the motion gets the materials less than 48 hours in advance and is hearing other cases during that time as well. Counsel must take seriously their duty to make the process efficient if it is to be effective.

[31] I do not suggest that complex, document-heavy cases cannot be determined summarily. However, in bringing such motions, counsel must do more than identify and fully reference in their factum the necessary facts that must be found, but must also exclude the irrelevant evidence, and not get distracted by tangential arguments. Counsel should also consider making use of other aides to assist the motion judge. Examples of this could include a condensed book for use at argument, an aide-memoire identifying each necessary finding (without argument) with full references to the evidence, organized by issue, or – something that would have been useful here, where very few facts are in dispute – an agreed statement of facts. Material that is available electronically, and is bookmarked and searchable, can also be of great assistance to the motion judge. A table of contents to a lengthy factum is a simple, but very useful, tool.

[32] This summary judgment motion was expensive for the parties. I doubt it cost less than a trial would have. I doubt it was faster than a trial would have been. In this case, I think a trial

would have been a more proportionate process. But the parties have invested their resources in the summary judgment motion. I agree with the parties that I can make findings on the basis of the record before me, and apply the law to the facts to reach a fair and just determination on the merits. I do not think the process employed here can be called proportionate, more expeditious or a less expensive means to achieve a just result, but having already invested the resources into the motion, it is simply too expensive for the parties for me not to proceed to determine the motion on its merits. In doing so, I rely on the documents counsel identified during oral argument, after I instructed them to take me to every document they thought was necessary for me to make the findings of fact they seek.

[33] In determining this summary judgment motion, I am also, of course, mindful, that while it is the moving party's onus to prove that there is no genuine issue requiring a trial, each party has the evidentiary onus to put his or her best foot forward on the motion. The court is entitled to assume that it has all the evidence that would be before it at trial: *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2015 ONSC 7695, at para. 161.

The Service Unit Mortgage

[34] I turn first to the service unit mortgage.

[35] In order to consider whether the service unit mortgage should be enforced or is oppressive, it is necessary to first understand what purchasers were told about the HVAC equipment and the service unit mortgage, and when they were told.

History of the Disclosure of the Service Unit Mortgage

[36] When the developer began selling dwelling units in the condominium development in September 2005, it intended to have a third party supply the HVAC equipment for the units and lease it to the unit owners. This arrangement was reflected in the original disclosure statement and original agreements of purchase and sale.

[37] The original disclosure statement, dated September 17, 2005, included a proposed declaration which provided that the residential units shall include "all pipes, wires, cables, conduits, ducts, mechanical or similar apparatus including heating and air conditioning equipment (if applicable)". It also stated that, notwithstanding,

> the heating/cooling system and domestic hot water tank may be leased, in which case the said equipment may be owned by the supplier of such equipment. These services also includes *[sic]* any fixture, outlet or any other facility with respect to any such service or utility that is within the boundaries of the Residential Unit and that provides service to the Residential Unit only, provided that such fixture, outlet and other facility provided by the supplier of cable television and telephone service may be owned by the supplier of such service.

[38] I asked how and whether the terms "heating/cooling system" and "These services" in the clause quoted above should be read together. Neither party was able to assist me on that

question. Moreover, I do not understand the conceptual difference between fixtures owned by the supplier of "such equipment" as opposed to those owned by "the supplier of cable telephone and telephone service". It is not clear to me why residential units shall include all heating and air conditioning equipment while notwithstanding, the heating/cooling system may be leased.

[39] The original agreements of purchase and sale ("APS") provided that purchasers of condominium units would purchase an undivided interest in the common elements described in Schedule B. Schedule B included, under the heading "Electrical features and rough-ins", "individually controlled leased heating, water tank and air conditioning unit". The original agreements of purchase and sale also provided that:

> Hot water tanks, furnaces and air conditioning units will be installed in the Unit prior to the Confirmed Possession Date and shall be leased from a third party lessor and shall not be or become the property of the Purchaser on Closing. The Purchaser shall make monthly lease payments payable to such lessor as identified by the Vendor and shall execute the lease agreements pertaining to the hot water tanks, furnaces and air conditioning units, as required by said lessor.

[40] The original APS also provided that the purchaser would examine the title at his own expense and would take title "subject to the terms and conditions contained in the registered Condominium Documents", which then was not defined in the original APS. Rather, the original APS included a list of "Disclosure Documents", which included the disclosure statement, proposed budget for the first year of operation, the proposed declaration and a proposed amendment to the proposed declaration, proposed by-laws, proposed rules and regulations, proposed condominium plans and a draft condominium management agreement. The original APS also defined "creating documents" as the declaration and description intended to be registered to create the condominium, as may be amended from time to time.

[41] The developer's plans with respect to the HVAC equipment did not work out. It could not find a supplier to provide and lease the equipment. The developer decided to purchase the HVAC equipment itself and sell it to the purchasers.

[42] The change with respect to the HVAC equipment was disclosed in the revised proposed declaration, included in the revised disclosure statement dated September 9, 2008. The revised proposed declaration reads:

(a) Each Residential Unit shall include:

> Notwithstanding anything hereinbefore provided to the contrary, each Residential Unit *shall exclude* all exterior doors and windows; any part of the roof assembly; all pipes, wires, cables, conduits, ducts, flues and mechanical or similar apparatus; all exterior walls and any interior load bearing wall or column that lies within the boundaries of any particular unit as hereinbefore set out that supplies service or support to another unit(s) or the common element.

(i) All pipes, wires, cables, conduits, ducts, and mechanical or similar apparatus that supply any service to that particular Residential Unit and that lie within or beyond the unit boundaries, and shall specifically include; *[sic]*

(ii) The complete individual mechanical heating system and duct work associated with it and the branch piping extending to the common pipe risers servicing the said Units;

…

(b) …

(c) Each Service Unit shall include the mechanical equipment and apparatus comprising the air conditioning equipment or hot water tank, whichever is applicable,[1] and any pipes, conduits, cables or wires extending to the common pipe risers that provide power and/or service to it.

Each Service Unit shall exclude any duct work which it utilizes for distribution of its services.

[43] The revised disclosure statement included a revised first year budget statement which disclosed the existence of the service unit mortgage and estimated its cost in the first year at $227,870. A note to the budget explains that the interest payable on the service unit mortgage will commence on the registration of the condominium corporation. It provides that the mortgage is based on a purchase price of $2,122,000 "inclusive of G.S.T. and a parking unit[2]" and that the mortgage bears interest at 4% over the Government of Canada 10 year bond yield with a 25 year term, yielding monthly payments of $18,989.13 at then current rates.[3] It provides that the actual monthly payment may be different and will be based on the interest rate at the time "as specified in these notes and in the Disclosure Statement. Please refer to the" *[sic]*.

[44] The revised disclosure statement was sent out accompanied by a letter which, consistent with the obligation in s. 74(3) of the *Act*, drew purchasers' attention to material changes in the disclosure. On the topic of the service unit mortgage, the letter said:

> The hot water tanks and heating and ventilation equipment servicing the residential units within the Proposed Condominium will not be rented from a lessor, as was contemplated at the time you purchased your unit. The hot water

[1] The developer states this is an error, as all units had both air conditioning equipment and a hot water tank.
[2] I can only assume that the reference to "a parking unit" is in error.
[3] There is no dispute between the parties that, by the terms of the service unit mortgage, interest accrues at 10% per annum.

> tanks and heating and ventilation equipment servicing the residential units shall be located within the Service Units, as such are described in the Proposed Disclosure Statement. The Service Units will be sold to the Condominium Corporation, once registered. The purchase price of the Service Units will be secured by a first mortgage on the Service Units in favour of the vendor of the Service Units. The cost of the mortgage payments will be a common expense payable by owners of the units within the Proposed Condominium and as reflected in the Revised Budget Statement.

[45] Of the 49 purchasers who purchased under the original disclosure statement, four rescinded after receiving the revised disclosure statement. The remaining 45 completed their purchases. Given the inclusion of the service unit mortgage in the letter accompanying the revised disclosure statement, and the rescission of their purchases by four purchasers, it is clear that the creation of the service units was a material change under s. 74 of the *Act*.

[46] The remaining 69 units were sold to purchasers under the revised disclosure statement.

[47] In total, there were four versions of agreements of purchase and sale. I have quoted relevant provisions from the original agreement of purchase and sale above at paras. 39-40. The other three versions also addressed the HVAC equipment and title as described below.

[48] The second and third versions of the APS provided:

> Each residential unit within the Condominium will be serviced with by *[sic]* a heating/cooling device (the "HVAC Equipment") providing climate control to said residential unit and located with *[sic]* a Service Unit, as such term is defined in the disclosure documents for the Condominium appended hereto in Schedule D. Each residential unit will further be equipped with a hot water tank (the "Hot Water Tank") providing hot water service to such residential unit and located within a Service Unit. The HVAC Equipment and Hot Water Tanks shall not be or become the property of the Purchaser on Closing.

[49] The second version of the APS provides that the purchaser would examine the title to the unit at his own expense, and would agree to accept title to the unit:

> …subject to the Condominium Documents being registered on title, notwithstanding that they may be amended and varied from the proposed disclosure documents which were given to the Purchaser when entering into this Agreement. The Purchaser further acknowledges that the registered Condominium Documents and final budget statement for the One (1) year period immediately following registration of the Condominium may vary from the proposed disclosure documents and budget statement given to the Purchaser when entering in this Agreement" *[sic]*.

[50] The "Condominium Documents" are defined as "the declaration and description which are intended to be registered to create the Condominium, as may be amended from time to time".

[51] The third version of the APS provided that the purchaser would examine the title to the unit at his own expense, and would agree to accept title to the Unit subject to the Condominium Documents being registered on title. In this version, "Condominium Documents" is defined as "the Declaration was registered to create the Condominium" *[sic]*.

[52] The fourth version of the APS provided:

> Each residential unit within the Condominium will be serviced with by *[sic]* a heating/cooling device (the "HVAC Equipment") providing climate control to said residential unit and located with a Service Unit, as such term is defined in the disclosure documents for the Condominium appended hereto in Schedule D owned by the Condominium Corporation. Each residential unit will further be equipped with a hot water tank (the "Hot Water Tank") providing hot water service to such residential unit and located within a Service Unit. The HVAC Equipment and Hot Water Tanks shall not be or become the property of the Purchaser on Closing.

[53] The fourth version of the APS also provided that the purchaser would examine the title to the unit at his own expense, and would agree to accept title to the unit subject to the Condominium Documents being registered on title. In this version of the APS, "Condominium Documents" are defined as the Declaration registered on February 1, 2010.

[54] The registered declaration defined what each Residential Unit included. Among the inclusions were:

> All pipes, wires, cables, conduits, ducts or similar apparatus that supply any service to that particular Unit only, and that lie within or beyond the unit boundaries thereof and shall specifically include.*[sic]*

[55] Among the exclusions from each Residential Unit were:

> The complete heating and cooling system, equipment and apparatus, including the hot water tank and any pipes, conduits, cables or wires extending to the common pipe risers.

[56] The registered declaration also provided that:

> Each Service Unit shall include the complete heating and cooling system, equipment and apparatus, including the hot water tank and any pipes, conduits, cables or wires extending to the common pipe risers that provide power and/or service to it or to the Residential Unit(s).
>
> Each Service Unit shall exclude any duct work which it utilizes for distribution of its services.

[57] The registered declaration was never delivered to purchasers. It was registered on title on February 1, 2010. GPC argues that each purchaser had the obligation to satisfy themselves with respect to title and could have found it easily themselves.

The Parties' Positions on the Service Unit Mortgage

[58] TSCC 2051 argues that the service unit mortgage is oppressive. It seeks a declaration that the mortgage is unenforceable, or alternatively, limiting the value of the mortgage to the amount it says relates to the units that were to be leased, namely, the hot water tanks, the air conditioning units and the furnaces. It states this amount is $525,000.

[59] TSCC 2051 makes the following arguments:

a. The original disclosure showed that the entirety of the balconies and terraces for the units would be common elements owned by all of the unit owners as tenants-in-common. An equitable interest in these elements was conveyed to the first 45 purchasers who received the original disclosure. The developer was not entitled to take space from these common elements to locate the air conditioning units (which are on each balcony and terrace) in a "service unit".

b. The developer could not locate the cables, wires, piping and thermostats into the service units and sell them, because those items were fixtures that had already been sold to purchasers under the APS.

c. A "unit" under the *Act* must have physical boundaries and the service units do not; rather, they reach into the dwelling units "like spaghetti".

d. The developer cannot unilaterally alter the terms of the APS by way of a revised disclosure statement.

e. The service unit mortgage is oppressive because the amount of it is not justified by the items the developer could sell to the condominium corporation. In other words, because the unit owners already owned the fixtures, and there is no issue that they own the ducting, the only thing the developer could sell to TSCC 2051 was the hot water tanks, the air conditioning units and the furnaces. The value of these items is $525,000. The service unit mortgage should be limited to this amount.

[60] GPS argues that:

a. A developer can unilaterally amend the provisions of an APS by way of a revised disclosure statement. This is consistent with s. 74(6) of the *Act*, which provides purchasers with a ten day rescission period following the receipt of a revised disclosure statement. This rescission period both protects the interests of the purchaser and allows the developer to respond to changing circumstances that affect the condominium development. After revised disclosure is delivered, and

the ten day rescission period passes without the purchaser rescinding, the developer is entitled to assume that it has a deal.

b. Disclosure was sufficient, the purchasers knew what they were buying, and there was no unfairness in the transactions.

c. The first directors of TSCC 2051 were entitled to organize the affairs of the corporation in a manner consistent with the disclosure that had been delivered.

[61] It is not necessary to address most of these issues. For the purposes of my analysis, I will assume that a developer can unilaterally alter an APS by way of a revised disclosure statement where the disclosure is sufficient, and that the first directors can organize the affairs of the condominium corporation accordingly. I will assume that the developer can take space from common elements and put them into a service unit. I will assume that the developer can take fixtures from residential units and put them into a service unit. I will assume that the developer can create a unit that reaches into another unit "like spaghetti".

[62] The first question I must consider is whether, in this case, the disclosure the unit owners received was sufficient to amend the APS, or, for those purchasers who purchased under the revised disclosure statement, for purposes of the *Act.*

The Law on Disclosure as it relates to Condominiums

[63] The parties agree that the *Act* is consumer protection legislation: *Albrecht v. Opemoco Inc.* (1991), 5 O.R. (3d) 385, at pp. 397-98. However, it also leaves room to consider the commercial realities of the condominium industry: *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1992), 10 O.R. (3d) 120, at p. 145.

[64] The *Act* requires a declarant to deliver a disclosure statement to prospective purchasers. An APS is not binding until a disclosure statement has been delivered, and then the purchaser has a ten day cooling off period to consider the terms of the deal and cancel it if they wish: ss. 71(1) and (2), s. 73(1) and (2).

[65] The purpose of a disclosure statement, and in my view, disclosure generally under the *Act*, is to set out the terms of the deal in readable, simple language: *Hidden Valley Lakeside Condominiums Inc. v. Vercaigne et al.*, 34710/91U (Ont. Gen. Div.), released October 21, 1997, at p. 44. Disclosure statements contain information that is important to a purchaser to make an informed purchase decision: *Abdool*, at p. 136.

[66] Disclosure will not meet the requirements of the *Act* where the terms of the deal are not clear, coherent or consistent, or where they do not provide full and accurate disclosure: *Hidden Valley*, at pp. 45, 50.

[67] When the commercial realities of the condominium industry require material changes to be made in the information provided to purchasers, a revised disclosure statement must be provided. Section 74(1) of the *Act* provides that:

> Whenever there is a material change in the information contained or required to be contained in a disclosure statement delivered to a purchaser under subsection 72 (1) or a revised disclosure statement or a notice delivered to a purchaser under this section, the declarant shall deliver a revised disclosure statement or a notice to the purchaser.

[68] Material change is defined in s. 74(2) of the *Act*. It includes a change that a reasonable purchaser would objectively regard as sufficiently important to her decision to purchase that she likely would not have entered into the APS or would have rescinded the APS if the original disclosure statement had contained the change. Here, as I have already noted, there is no question that the service unit mortgage was a material change.

[69] When a revised disclosure statement is delivered, a purchaser has a further ten day cooling off period within which they can rescind the deal: s. 74(6).

[70] In deciding whether a disclosure statement complies with the *Act*, the court employs an objective standard. It asks what a reasonable person in an Ontario community would think about its sufficiency: *Benner v. HLS York Developments Ltd.* (1985), 52 O.R. (2d) 243, at p. 246.

[71] In *Toronto Standard Condominium Corp. No. 2130 v. York Bremner Developments Ltd.*, 2016 ONSC 5393, 75 R.P.R. (5th) 243, at paras. 54-58, this court considered the meaning of "clear and adequate" disclosure under s. 113 of the *Act*, a provision that relates to mutual use agreements that is not directly in issue here. The court held that clear and adequate disclosure required disclosure of the key terms of the agreement. This holding is consistent with the holding in *Hidden Valley* that the disclosure must set out the terms of the deal in simple, readable language. Consistent with its character as consumer protection legislation, under the *Act*, purchasers are entitled to know what the terms of the deal are.

[72] In my view, if a disclosure statement can modify the terms of an APS, at the very least, it must explain the modification in simple, readable language. For the terms in a disclosure statement to bind a purchaser, the disclosure must set out the deal in simple, readable, language. In this case the disclosure about the HVAC equipment or systems was confusing.

[73] The disclosure is confusing in the individual documents. For example, the structure of the description of each Residential Unit in the revised proposed declaration begins by excluding "all pipes, wires, cables, conduits, ducts, flues and mechanical or similar apparatus…that supplies service or support to another unit(s) or the common elements" (which include the balconies and terraces). It then specifically includes "all pipes, wires, cables, conduits, ducts and mechanical or similar apparatus that supply any service to that particular Residential Unit and that lie within *or beyond* the unit boundaries and shall specifically include" [my emphasis]. Include what? The document does not say.

[74] The next paragraph in the revised proposed declaration tells the reader that "the complete individual mechanical heating system and duct work associated with it and the branch piping" is included in the residential unit. And then the Service Unit is described as "the mechanical equipment and apparatus comprising the air conditioning equipment or hot water tank, whichever is applicable, and any pipes, conduits, cables or wires extending to the common pipe risers that provide power and/or service to it". The Service Unit then specifically excludes the duct work.

[75] This disclosure does not tell the reader in simple, readable language what she is purchasing.

[76] Moreover, the disclosure is confusing when considered collectively. For example, the revised disclosure statement is not consistent with the letter that accompanied it. The letter provided that "the hot water tanks and heating and ventilation equipment…will not be rented from a lessor, as was contemplated". The letter goes on to describe that these items will be located in service units. The letter thus seems to suggest that the service units will be comprised of the items that originally were going to be leased from a third party lessor. The original disclosure statement stated "the heating/cooling system and domestic hot water tank may be leased, in which case the said equipment may be owned by the supplier of such equipment". When read with the original APS, it suggests that the original disclosure statement was meant to refer to the hot water tanks, air conditioning units and furnaces only. The original APS stated that "Hot water tanks, furnaces and air conditioning units will be installed in the Unit prior to the Confirmed Possession Date and shall be leased from a third party lessor".[4]

[77] A purchaser who purchased after the revised disclosure statement was delivered would have also had her APS, which suggests that the heating/cooling device (defined as the "HVAC Equipment") and the hot water tank is included in the service unit, and will not become the property of the purchaser on closing. The HVAC provisions in the APS do not suggest that the pipes or wires are part of the service unit.

[78] I fail to see how any reader of the disclosure would have any idea, for example, which pipes they were purchasing. That the disclosure is replete with grammatical errors and missing words exacerbates the problem. Moreover, looked at over its history, the disclosure about the HVAC system changes.

[79] In my view, there are only two things that are clear from the disclosure. First, the hot water tank, air conditioning units and furnaces were never included in the purchase price for the condominium units. Originally they were to be leased. Later, they were to be part of the service units.

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[4] I note that the original disclosure was also unclear given that Schedule B to the original APS suggested that the common elements the purchasers would purchase an interest in would include "leased heating, water tank and air conditioning unit".

[80] Second, it is clear from the revised budget statement that the principal amount of the service unit mortgage was $2,122,000, and that the payments in the first year would be $227,870. However, even in the revised budget statement there is some uncertainty, in that the note with respect to the service unit mortgage refers readers to "the". The what? The reader is left to guess at what has been omitted.

[81] The question is therefore whether the clarity around the amount of the mortgage is sufficient disclosure to overcome the other disclosure problems.

[82] I reject GPC's argument that the purchasers could have found the deal by reviewing the registered declaration on title, and that they should have done so because their APS required them to satisfy themselves as to title. Such a conclusion would run contrary to the character of the *Act* as consumer protection legislation, and would be at odds with the regime in s. 74 of the *Act* that requires the declarant to notify purchasers of material changes, and provide purchasers with an opportunity to rescind.

[83] In my view, the disclosure of the service unit mortgage does not explain the deal, as that deal was set out in the registered declaration, to purchasers. The disclosure was insufficient. This conclusion applies to both those purchasers who purchased under the original disclosure statement and then received the revised disclosure statement and did not rescind, as well as those who purchased under the revised disclosure statement.

[84] Having determined that the disclosure of the service unit mortgage was insufficient for purposes of the *Act* or to amend the APS, I next turn to consider whether TSCC 2051 is entitled to an oppression remedy.

Is the service unit mortgage oppressive?

[85] TSCC 2051 seeks to have the service unit mortgage declared unenforceable on the basis of the oppression remedy contained in s. 135(1) of the *Act*:

> On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter.

[86] The legal framework within which to evaluate claims of oppression was set out by the Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560. The Court held, at para. 58, that oppression is an equitable remedy, giving a court broad, equitable jurisdiction to enforce not just what is legal but what is fair. See also *Hakim v. Toronto Standard Condominium No. 1737*, 2012 ONSC 404, 16 R.P.R. (5th) 315, at para. 37.

[87] The Supreme Court set out a two-part test for oppression at para. 68 of *BCE Inc.*: (i) Does the evidence support the reasonable expectation asserted by the claimant; and (ii) Does the evidence establish that the reasonable expectation was violated by conduct falling within the

terms “oppression”, “unfair prejudice” or “unfair disregard” of a relevant interest? See also *Hakim*, at para. 42.

[88] When determining whether an applicant’s reasonable expectations have been breached, the court looks at the entire context: *Hakim*, at para. 43.

[89] The Supreme Court described the conduct required to engage the oppression remedy, at para. 67 of *BCE Inc.*. It found that “oppression” carries the sense of coercive and abusive conduct, and suggests bad faith. “Unfair prejudice” may admit of a less culpable state of mind but which nevertheless has unfair consequences. “Unfair disregard” of interests relates to ignoring an interest as being of no importance, contrary to the stakeholder’s reasonable expectations. These terms describe different ways in which a defendant may fail to meet a plaintiff’s reasonable expectations.

[90] When a judge makes a finding of oppression, unfair prejudice or unfair disregard, the judge can make “any order deemed proper” to redress the situation: s. 135(3) of the *Act*.

[91] When considering whether the reasonable expectations of TSCC 2051 and the unit purchasers have been breached, I agree with GPC that I must consider the condominium documents and the *Act*. In my view, I must also consider the APS that the unit purchasers signed and the letter that accompanied the revised disclosure statement.

[92] I have already reviewed the problems with the disclosure. In my view, based on the documents provided, TSCC 2051 and the unit purchasers reasonably expected that the unit purchasers were agreeing to a mortgage in the amount of $2,122,000 in respect of the furnaces, air conditioning units and hot water tanks. They did not expect that mortgage to include the wires and pipes, or any other fixtures.

[93] Since the mortgage is in fact also in respect of other fixtures such as pipes and wires, in my view, the reasonable expectations of TSCC 2051 and the unit purchasers have been breached. They did not reasonably expect to be paying a mortgage in respect of items they reasonably thought the unit purchasers had already bought when they purchased their residential units.

[94] This is particularly so in view of the fact that the *Act* provides a disclosure regime and is consumer protection legislation. I have already found, at paras. 72-84, that the developer failed in its duty to disclose the terms, or the material changes, relating to the service unit mortgage in simple, readable language.

[95] In my view, it was not necessary for TSCC 2051 to prove reliance on the part of any purchaser to prove a breach of their reasonable expectations. In considering their reasonable expectations, I am entitled to consider the entire context, which includes an objective assessment of what the disclosure said, and how it would have affected the reasonable expectations of the unit purchasers and the condominium corporation.

[96] With respect to the second branch of the test, I find that the developer ignored the interests of TSCC 2051 and the unit purchasers. It was not entitled to sell the pipes and wires to

TSCC 2051 and take a vendor take-back mortgage in respect of, among other things, those pipes and wires, when it had not properly disclosed to the unit purchasers that they had not purchased the pipes and wires with their dwelling units. Purchasers were entitled to understand what they were purchasing. By failing to clearly disclose to them the nature of the units they were purchasing, and creating confusion about it through faulty disclosure, the developer unfairly disregarded the interests of TSCC 2051 and the unit purchasers.

[97] A remedy is required to rectify the unfair disregard of these interests. The oppression remedy is an equitable one. It gives the court broad, equitable jurisdiction to enforce not just what is legal, but what is fair. In considering claims for oppression, courts should look at business realities, not merely narrow legalities: *BCE Inc.*, at para. 58.

[98] In my view, the remedy required in this case is to adjust the terms of the service unit mortgage to make it consistent with the reasonable expectations of TSCC 2051 and the unit purchasers. The principal amount of the service unit mortgage must thus be adjusted to reflect the cost of the supply and installation of the hot water tanks, the furnace and the air conditioning units, plus some margin of profit.

[99] GPC's evidence included a chart breaking down the cost of the HVAC system, including the air conditioning, furnace and hot water tanks. Based on this evidence, the total cost of the system was $1,708,561, to which GPC added overhead of 15% and an administration fee of 8%, to reach a total of $2,122,000. This cost included $850,000 for supply and installation of ductwork, which both parties agree was never included in the service unit mortgage. It thus appears that on GPC's calculation of the mortgage amount, over half of the principal amount of the mortgage was for overhead, profits and ductwork, which was not sold as part of the service unit mortgage in any event.

[100] TSCC 2051's expert has identified which of the items on GPC's cost breakdown relate to the furnaces, hot water tanks and air conditioning units. These items total $525,000. TSCC 2051 argues that the value of the service unit mortgage should be limited to this amount.

[101] GPC argues that it is not required to sell the items to TSCC 2051 at cost. I agree with GPC on this point.

[102] The cost breakdown prepared by GPC includes 15% overhead and 8% administration fees. The administration fee was charged on the cost of the supply and installation of the system and on the overhead charges. In my view, these amounts are fairly added to the costs of the furnaces, air conditioning units and hot water tanks. By my calculation, on this basis the principal amount of the service unit mortgage, adjusted to reflect the reasonable expectations of TSCC 2051 and the unit purchasers, is $652,050.

[103] There is also the question of interest. TSCC 2051 argues that interest should not accrue in accordance with the terms of the mortgage. It argues that the interest rate was higher than was available at the time the mortgage was entered into. It argues that, in view of the developer's conduct with respect to the service unit mortgage, interest should be simple interest only.

[104] GPC argues that the interest rate on the mortgage reflects the interest rate that the developer was actually paying on the funds that it borrowed to supply and install the HVAC system. It argues that the mortgage was fully open and could have been refinanced at any time at a lower rate. It argues that the mortgage documentation clearly requires compound interest.

[105] On this issue, I agree with GPC. The plaintiff and unit purchasers would have reasonably expected the mortgage to accrue compound interest. Mortgages typically do. I also find that the interest rate of 10% was properly disclosed, and not unreasonable, especially in view of the interest rates the developer was paying on its own loans, and the fact that the mortgage was fully open.

[106] Finally there is the question of whether TSCC 2051 should only be required to pay 24/25 of the amount owing under the service unit mortgage, on the terms I have found must apply to it. They argue that, because TSCC 2051 had a budget deficit in the first year, any amounts owing on the mortgage would have increased the budget deficit and would have become the responsibility of the developer under s. 75(5) and (6) of the *Act* in any event.

[107] I deal with the question of the first year budget deficit below, at paras. 164-173. As will be seen in my analysis of that issue, I accept TSCC 2051's argument that it had a budget deficit in the first year. It follows that the amount owing in the first year of the service unit mortgage, adjusted for the terms as I have found them, would have been an amount that the developer would have had to repay to TSCC 2051 due to the budget deficit. Accordingly, I agree with TSCC 2051 that its responsibility must be adjusted to account for this amount. I note that this amount may not equal 1/25 of the full amount owing because of the compounding of interest over the time that has passed. Rather, the calculation of what TSCC 2051 owes under the service unit mortgage should deduct the amounts it would have had to pay in the first year of its operation, and any interest accruing thereon.

[108] As a result, I conclude that the service unit mortgage shall be reduced to the principal amount of $652,050 and shall accrue interest in accordance with the terms of the mortgage, that is, interest at the rate of 10% per annum, compounded monthly. To obtain the total amount owing by TSCC 2051, the parties must deduct the amount that would have been paid on the mortgage in TSCC 2051's first year of operation based on the terms I have found, plus interest thereon.

The Parking Unit Mortgage

[109] The condominium development included parking spaces and storage lockers that purchasers could purchase in addition to their dwelling units. The developer sold 112 dwelling units with 113 parking units and six storage units to first purchasers in arms-length transactions. Almost all purchasers bought one parking unit and no more.

[110] Thirty-two parking units went unsold. Sixteen storage units also went unsold. In addition, there were two combined parking and storage units that went unsold.

[111] The developer decided to sell these surplus units to TSCC 2051 for $25,000 per parking unit, $4,500 per storage unit and $29,500 per combined parking and storage unit.

[112] To secure the purchase price for the surplus units, the developer registered a $1,026,375 mortgage against the units. The terms of the mortgage provided that there were to be no payments in the first year after the condominium was created, and thereafter, annual payments of $111,920.16 were to be made for 24 years. Interest accrues at 10% per annum. The mortgage was fully open.

[113] The parties agree that there is an error in the amount of the mortgage, and that the correct mortgage amount is $925,050.

[114] As with the service unit mortgage, the parking unit mortgage was entered into when the developer was in control of the board, prior to the turnover meeting.

[115] No payment has been made on the parking unit mortgage.

[116] The developer notified the purchasers about the intended creation of the parking unit mortgage in the revised disclosure statement and the letter that accompanied it. It, too, was a material change.

[117] The revised disclosure statement disclosed that the declarant would convey the unsold units, and disclosed the purchase price for each unit. It explained that no payment would be due on the parking unit mortgage in the first year, and disclosed the interest rate on the mortgage, and the payments due. The disclosure statement also provided information about the number of unsold units existing at that time:

> At the time of this revised disclosure statement, there are thirty four (34) unsold Parking Units, twenty-six (26) unsold Storage Units and two (2) unsold Combined Parking/Storage Units that shall be conveyed to the Condominium by the Declarant pursuant to this Section 4.11.

[118] The letter said:

> The unsold Storage Units, unsold Parking Units and unsold Combined Parking/Storage Units will be sold to the Condominium Corporation, once registered. The purchase price of the unsold units will be secured by a first mortgage on the said units in favour of the vendor of the said units. The cost of the mortgage payments will be a common expense payable by owners of units within the Proposed Condominium, as reflected in the Revised Budget Statement.

[119] The Revised Budget Statement reflected nothing in respect of the parking unit mortgage because, by the terms of the mortgage, it was not a first year expense.

[120] The revised budget statement includes a note that states:

> There are no services not included in the foregoing Budget that the Declarant provides, or expenses that the Declarant pays and that might reasonably be expected to become, at a subsequent time, a common expense.

[121] TSCC 2051 argues that the parking unit mortgage is oppressive because the developer sold the units to it at a grossly inflated value. The parties have secured competing expert reports about the valuation of the surplus units. TSCC 2051 also argues that the disclosure was inadequate.

[122] In my view, the question about the validity of the parking unit mortgage can be answered through consideration of the adequacy of the disclosure.

[123] I have already reviewed the legal principles relevant to disclosure under the *Act*, at paras. 63-71 above. They apply equally here. The question is whether the disclosure of the parking unit mortgage was sufficient to hold the purchasers to the bargain the developer states they made. Did the disclosure tell purchasers what the deal was, in simple, readable language?[5]

[124] In my view, there are several problems with the disclosure.

[125] First, the revised disclosure statement did not tell purchasers how much the parking unit mortgage would be. GPC argues this was impossible to do, since the developer did not know how many units would go unsold. TSCC 2051 argues that the developer could have set out the maximum amounts.

[126] GPC argued that the disclosure was sufficient in any event. Counsel submitted that all a purchaser would have to do to understand the maximum financial liability from the parking unit mortgage would be to (i) multiply the number of then-outstanding parking units by the parking unit price; (ii) multiply the number of then-outstanding storage units by the storage unit price; (iii) multiply the number of then-outstanding combined parking/storage units by the combined parking/storage unit price; (iv) add those three figures together; and (v) download an amortization program from the internet; (v) figure out how to run the amortization calculation using the total possible cost of surplus units and the disclosed interest rate.

[127] I disagree that this is sufficient disclosure to purchasers under the *Act*.

[128] Moreover, the disclosure in the revised disclosure statement is confused by the letter that accompanied it, which clearly directs the purchasers to the revised budget statement to see the mortgage payments owing, when those mortgage payments are nowhere reflected on the revised budget statement. Rather, the revised budget statement tells purchasers that there are no services the declarant provides, or expenses the declarant pays, that are reasonably expected to become a common expense at a subsequent time. It is questionable whether the construction of the surplus

[5] There is no allegation that the parking unit mortgage amended the existing APS's in any way.

units or their conveyance to TSCC 2051 are a service or an expense, but this note to the revised budget statement adds to the confusion around the disclosure of the parking unit mortgage.

[129] I now turn to consider whether the insufficient disclosure of the parking unit mortgage entitles TSCC 2051 to an oppression remedy.

Is the parking unit mortgage oppressive?

[130] In my view, the parking unit mortgage is oppressive. The unit purchasers would reasonably expect that a letter directing them to the budget statement to find the cost of the mortgage payments would mean that the parking unit mortgage liability was reflected in the budget statement. A purchaser would not reasonably have expected a significant liability to arise in the second year of TSCC 2051's operation.

[131] This is particularly so given that the revised disclosure statement did not disclose the amount or the maximum amount of the mortgage. TSCC 2051 argues that only the developer could have known that purchasers of dwelling units were almost uniformly buying only one parking unit with their residential unit. There was no way for purchasers reading the revised disclosure statement to know that it was likely that most of the surplus units would not be sold. I agree. Only the developer had that information, and it did not share it.

[132] I find that the unit purchasers and TSCC 2051 reasonably expected that a significant liability would be disclosed in simple, readable language. It was not. Their reasonable expectations were breached. Even without the letter that accompanied the revised disclosure statement, the disclosure was not sufficient such that purchasers who bought after the revised disclosure statement was delivered did not receive adequate disclosure and their reasonable expectations were also breached.

[133] Moreover, I find that this conduct of the developer unfairly disregarded the interests of TSCC 2051 and the unit purchasers. By delivering confusing and imprecise disclosure, the developer ignored their legitimate interests in understanding their responsibility for common expenses including the parking unit mortgage.

[134] There remains the question of the appropriate remedy. TSCC 2051 seeks an order that the parking unit mortgage is unenforceable.

[135] TSCC 2051 delivered expert evidence from Agnes Lee, who valued the surplus units. She assessed their value using a direct market comparison approach, looking at comparable sales of other parking and storage units within nearby condominium developments at about the date of the transaction. She assessed the value of all 48 surplus units at $73,000.

[136] In reaching her conclusion, Ms. Lee also considered the assessed value of the units for taxation purposes. She opined that only a small number of surplus units would have any value to TSCC 2051 because there were so many surplus units as compared to the number of dwelling units in the development. As a result, she concluded that most of the surplus units and their carrying costs were a liability, not an asset.

[137] GPC delivered expert evidence from Dale Panday, who opined that the cost to construct each parking unit was $35,900. GPC also delivered a report from Paul Stewart who opined that the value of the surplus units was $800,000. In reaching this conclusion, Mr. Stewart looked at prices at which parking units were offered when they were being sold alongside dwelling units. He did not discount the value of the surplus units because their sale was a bulk transaction. He did not consider the restricted market for the parking units.

[138] The evidence establishes that TSCC 2051 was able to lease two of the surplus parking units for $75/month only recently, an amount that is less than the monthly common expenses for those units. It has not succeeded in selling any units.

[139] In my view, Ms. Lee's evidence is the best evidence as to the value of the surplus units. She made reasonable assumptions in assessing the value of the surplus units, and her conclusion is supported by the evidence that TSCC 2051 has not been successful in selling the surplus units.

[140] GPC complains that Ms. Lee looked at very few comparable sales. In my view, this small comparative sample is indicative of the fact that there is a very small market for parking units that are not sold alongside residential units.

[141] Accordingly, it is my view that the parking unit mortgage should be amended to reflect a principal amount owing of $73,000. This is consistent with the reasonable expectations of the unit purchasers and TSCC 2051, that there would be some mortgage in respect of the surplus units, but that it would likely be minimal, in view of the contradictory and confusing disclosure, the failure to set out maximum exposure under the parking unit mortgage in the revised disclosure statement, and the lack of inclusion of any amount for the parking unit mortgage on the first year budget statement notwithstanding the letter that directed purchasers there to ascertain the expense. This amount also reflects a fair value for the units that were transferred to TSCC 2051.

[142] With respect to the interest payable, for the reasons set out in para. 105 above, I find that the interest set out in the terms of the mortgage is appropriate. The purchasers would reasonably have expected compound interest on the mortgage, and the rate was disclosed in the revised disclosure statement.

[143] Accordingly, I conclude that the parking unit mortgage principal amount shall be reduced to $73,000 and the mortgage shall bear interest in accordance with its terms.

The Promissory Note

[144] The third debt instrument at issue is a promissory note dated April 12, 2010, from TSCC 2051 to the developer or its assignee. The note is for the principal sum of $90,034.26. This sum represents the land transfer tax owing on the transfer of the freehold estate from the developer to TSCC 2051. Under the revised declaration, TSCC 2051 was the party responsible for paying the land transfer tax. However, TSCC 2051 did not have the money to pay it, so the developer paid it and caused TSCC 2051's board, when the board was under its control, to enter into the promissory note.

[145] Under the terms of the note, no interest accrued until April 11, 2011. Thereafter, interest accrues at 12% per annum, calculated monthly. The note was fully open. The note provides for monthly payments commencing on May 12, 2011 and continuing until March 12, 2014, with the remaining balance payable on April 12, 2014. Because the first payment under the promissory note was not due until May 12, 2011, after the condominium corporation's first year, the note did not appear in the first year budget contained in the revised disclosure statement.

[146] TSCC 2051 has made no payments on the promissory note. It offers two reasons why the note cannot be enforced.

[147] First, TSCC 2051 argues that the developer used its control of the board of directors to, in effect, make TSCC 2051 liable for costs which should have been paid by the developer. TSCC 2051 states that it did not have the money to pay the land transfer tax at the time it was due. As a result, had it made the payment when it was required, the first year budget deficit would have increased by the value of the land transfer tax owing.

[148] TSCC 2051 relies on s. 75 of the *Act* which provides that:

> The declarant shall pay to the corporation the amount by which the total actual amount of common expenses incurred for the period covered by the budget statement, except for those attributable to the termination of an agreement under section 111 or 112, exceeds the total budgeted amount.

[149] By lending the money to TSCC 2051, and deferring the first payment until after the first year, TSCC 2051 states that the developer circumvented its accountability for the first year budget. TSCC 2051 argues that this is contrary to the spirit of the *Act*, which is consumer protection legislation.

[150] TSCC 2051 relies on *Strata Plan 1261 v. 360204 B.C. Ltd.* (1995), 50 R.P.R. (2d) 62, at paras. 104-107, to argue that a developer cannot utilize its control of the condominium corporation in its infancy to better its position at the expense of past, present and future owners.

[151] I accept this argument. In my view, by deferring payments under the promissory note until after the time period covered by the first year budget, the developer was seeking to avoid a deficit that it would have had to make good. It improperly preferred its position over that of the owners. Section 75 of the *Act* is designed to encourage developers to accurately disclose the costs that owners will incur when they buy a condominium unit. The purpose of the section would be frustrated if developers could simply "lend" money to the condominium corporation and defer payments until after the first year budget period has expired.

[152] I note that the thrust of the developer's argument with respect to the note centered on the fact that TSCC 2051's liability for the land transfer tax was disclosed in the revised disclosure statement. In my view, that disclosure does not allow a developer to take deliberate steps to circumvent the consumer protection regime set out in the *Act*, as I find it did in this case.

[153] TSCC 2051 and the unit purchasers reasonably expected that the developer would not bury costs outside of the first year budget to better its position at their expense. This is particularly so in view of the note to the revised budget statement that "there are…no expenses that the Declarant pays and that might reasonably be expected to become, at a subsequent time, a common expense". The land transfer tax was an expense the developer (declarant) paid. The disclosure on the issue of the note was insufficient.

[154] Moreover, the note unfairly disregarded the interests of TSCC 2051 and the unit purchasers by requiring them to pay for an expense that the developer would have had to make good had it been paid by TSCC 2051 when it was incurred.

[155] I conclude that the promissory note is oppressive and should be set aside. TSCC 2051 and the unit purchasers reasonably expected TSCC 2051's obligation to pay land transfer tax would arise on the transfer of the land, and be subject to the protections in s.75 of the *Act* relating to overages in the first year budget statement.

[156] I also accept TSCC's second argument, that the note is void because it is contrary to s. 56(3) of the *Act*. GPC did not address this argument in its written or oral submissions. Section 56(3) provides:

> A corporation shall not borrow money for expenditures not listed in the budget for the current fiscal year unless it has passed a by-law under clause (1)(e) specifically to authorize the borrowing.

[157] The case law holds that even where a condominium corporation has a general borrowing by-law, s. 56(3) requires a specific by-law for the condominium to borrow funds for something that does not appear in the budget: *York Condominium Corp. No. 42 v. Hashmi*, [2007] O.J. No. 2085 (S.C.), at paras. 17-21.

[158] TSCC 2051 did not pass a by-law authorizing the promissory note. Accordingly, the note is void.

The Arrears in Common Expenses

[159] TSCC 2051 argues that the developer owes it $38,725.91 for arrears of common expenses. GPC confirmed this amount in an answer to an undertaking, but subsequently advised TSCC that the calculation was incorrect. GPC states that TSCC 2051's calculations do not take into account certain payments that the developer made.

[160] This issue is barely canvassed in the parties' written submissions and was hardly addressed in oral argument. GPC's counsel took me to a chart from TSCC 2051's productions that showed no payments made in respect of arrears for a particular unit, and then to a letter that showed that payments had been made in respect of arrears for that same unit. In contrast, TSCC 2051's counsel took me to its affiant's evidence confirming that $38,725.91 is owing in common expense arrears, supported by a different chart.

[161] In the context of the issues raised on this motion, I understand that the arrears of common expenses were a small issue. But it was counsel's obligation to put forward the evidence I need to decide the issue. I was left with two brief narratives, neither of which fully addressed the evidence on this issue. However, nothing in TSCC 2051's submissions explains why one calculation of the amount owing appears to include common expense arrears that seem to have been paid. TSCC 2051 did not address the concerns about its calculation raised in the affidavit of Indira Spandu, which was filed by GPC on the motion.

[162] The claim for common expense arrears is TSCC 2051's claim. TSCC 2051 bears the burden of proof. I conclude that TSCC 2051 has failed to prove anything is owing beyond the arrears admitted by GPC. I thus conclude that the outstanding common arrears total $15,591.79, which is the amount GPC has admitted is owing.

[163] GPC also concedes that compound interest is payable on this amount. The applicable rate, set out in TSCC 2051's by-laws, is 12% per annum compounded monthly.

The First Year Budget Deficit

[164] Sections 75(5) and (6) of the *Act* provide that a developer is responsible for any budget shortfall in the first year of a condominium corporation's operation. The shortfall must be made good within 60 days from the date of the condominium corporation's first year financial statement. TSCC 2051 has produced its first year financial statement and states that its first year deficit was $16,241.

[165] GPC challenges certain items in TSCC 2051's first year expenses. Notably, it complains about $35,012 paid in legal fees. The first year budget anticipated legal fees of $525.

[166] TSCC 2051's evidence is that the legal fees do not relate to this action. It states it incurred legal fees because it was necessary to chase the developer for documents the developer was obliged to give it. I have seen no dockets or accounts of counsel to substantiate the fees. However, GPC did not point me to any evidence that efforts to chase it for documents were unnecessary.

[167] TSCC 2051 also points out that, on examination, Gene Maida refused to answer questions about TSCC 2051's retainer of legal counsel while he was a director of TSCC 2051.

[168] GPC also challenges a first year expense for "Costs-Corporation Units" in the amount of $28,336. No amount was allocated for this item in the first year budget. TSCC 2051's evidence is that costs were incurred for repairs and maintenance for hot water tanks and HVAC equipment, none of which came with a warranty. Some of these expenses were incurred in the condominium's first year of operations. TSCC 2051 thus submits that the "Costs-Corporation Units" item relates to repairs that were necessary in the units owned by the corporation.

[169] In my view, the burden of proving that the expenses are unreasonable such that the developer is not responsible for them lies on the developer: *90 George Street Ltd. v. Ottawa-Carleton Standard Condominium Corp. No. 815*, 2015 ONSC 336, at para. 87.

[170] In this case, not only has the developer failed to meet its burden of proof, the evidence allows me to make a positive finding that TSCC 2051's expenses in its first year of operation were reasonable. In circumstances where the developer's own actions required TSCC 2051 to engage counsel to force the developer to hand over documents, and where Mr. Maida refused to answer questions about the condominium's retainer of counsel while he was a director, GPC cannot criticize the amount of legal fees incurred.

[171] I accept TSCC 2051's evidence and submission with respect to the "Costs-Corporation Units" item in the first year expenses.

[172] I thus conclude that the amount owing in respect of the first year budget deficit is $38,725.91.

[173] I further conclude that interest on the first year budget deficit is calculated at the rate set out in the condominium's by-laws, that is, 12% per annum compounded monthly: *90 George Street Ltd.*, at para. 104.

The s. 80(5) Reserve Fund Payments

[174] The parties agree that the developer had the obligation to make payments into the reserve fund by virtue of s. 80(5) of the *Act*. GPC calculates this amount at $16,471.57. TSCC 2051 accepts this calculation.

[175] The dispute between the parties relates to interest payable. TSCC 2051 seeks interest payable in accordance with its by-laws. GPC argues that the by-law in question, by-law 11.6(a), does not apply because the amount owing relates to occupancy fees, not common expenses, and the by-law interest rate provisions apply only to common expenses.

[176] The by-law reads:

> Arrears of payments required to be made under the provisions of this Article 11.00 shall bear interest at the rate of 12% per annum and shall be compounded monthly until paid.

[177] While Article 11.00 is entitled "Assessment and Collection of Common Expenses," it includes the requirement that the Board "establish and maintain reserve funds in accordance with the *Act*" (by-law 11.2), in addition to owners' obligations to pay their share of common expenses (by-law 11.4).

[178] Accordingly, I conclude that the by-law applies to the outstanding reserve fund payments. Interest on the amount owing thus accrues at 12% per annum, compounded monthly.

The Appointment of a Receiver

[179] GPC seeks an order appointing a receiver if the amounts owing to it under these reasons are not paid within 30 days. In oral argument, counsel suggested that 60 or 90 days would also be acceptable.

[180] In support of its request for a receiver, GPC relies on r. 41.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which deals with interlocutory orders and draws on the authority of the court to appoint a receiver set out in s. 101 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43. Section 101 appears in the *Courts of Justice Act* under a section entitled "Interlocutory Orders" and provides:

> In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

[181] Neither party has provided me with any law on this issue. Neither delivered any significant oral or written argument on the issue. It is not clear to me why, on this summary judgment motion that is meant to dispose of the entire action, I am entitled to make an interlocutory order appointing a receiver.

[182] GPC also relies on r. 60.02(1)(d), which provides that an order for the payment or recovery of money may be enforced by the appointment of a receiver. However, again I have been given no law on the factors I should consider when determining whether to appoint a receiver to enforce an order for the payment of money in the very same decision in which I find that money is owed.

[183] GPC argues that a receiver is appropriate in this case because, on cross-examination, TSCC 2051's affiant gave evidence that TSCC 2051 does not have cash or assets it can liquidate to satisfy any judgment. TSCC 2051 has about $800,000 available, and beyond that it would have to levy a special assessment or refinance to satisfy a judgment. GPC argues that a receiver is therefore necessary to ensure that TSCC 2051 takes the necessary steps to pay any judgment. It points out that TSCC 2051 has failed to make any payments on the financial instruments thus far.

[184] TSCC 2051 opposes the requested relief. It states that the developer has not shown that TSCC 2051 is not able to manage its affairs.

[185] In these circumstances, I agree with TSCC 2051. Appointing a receiver would be an extraordinary interference with the management of TSCC 2051's affairs by its board. I see no reason to do so, especially since TSCC 2051's witness indicated that the corporation would take steps to satisfy any judgment in GPC's favour. The evidence discloses no basis for me to conclude that TSCC 2051 cannot manage its affairs such that a receiver must be appointed.

Costs and Other Outstanding Issues

[186] In these reasons, I have made determinations of the rate of interest payable on the amounts owing and provided directions to calculate the amount owing on the service unit mortgage. Counsel shall cooperate to calculate the amounts owing based on my findings. If there is any dispute, counsel may contact me and I will determine how to address it.

[187] If the parties cannot agree on costs, they may make submissions of no more than six pages, plus costs outlines and any offers to settle, to be exchanged within 14 days of the release of these reasons. They may then exchange responding submissions, not to exceed three pages, within five days thereafter. Submissions may be delivered to my attention at Judges' Administration, 361 University Avenue.

Akbarali J.

Released: May 31, 2018

CITATION: TSCC No. 2051 v. Georgian Clairlea Inc. et al, 2018 ONSC 2515
COURT FILE NO.: CV-11-435360
DATE: 20180531

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Toronto Standard Condominium Corporation No. 2051
Plaintiff

– and –

Georgian Clairlea Inc., Residences of Clairles Gardens Inc., Anthony Maida, Frank Maida, Gene Maida, Georgian Corporation, The Equitable Trust Company and Firm Capital Mortgage Fund Inc.

Defendants

-and-

Georgian Properties Corporation
Plaintiff by Counterclaim

REASONS FOR JUDGMENT

Akbarali J.

Released: May 31, 2018