

**In the Court of Appeal of Alberta**

**Citation: Francis v Empire Gardens Condominium Corporation, 2019 ABCA 471**

**Date:** 20191203

**Docket:** 1803-0220-AC

**Registry:** Edmonton

QB File No. 1603 04719

**Between:**

**Sebastian Anthikatt Francis and  
Abhirami Ajithbhavanam Padmanabhan**

Appellants  
(Applicants)

- and -

**The Empire Gardens Condominium Corporation represented by  
AIM Real Estate Corporation**

Respondent  
(Respondent)

QB File No. 1603 05178

**And Between:**

**The Owners: Condominium Plan No. CD13015**

Respondent  
(Plaintiff)

- and -

**Sebastian Anthikatt Francis and  
Abhirami A. Padmanabhan**

Appellants  
(Defendants)

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**The Court:**

**The Honourable Mr. Justice Frans Slatter  
The Honourable Madam Justice Barbara Lea Veldhuis  
The Honourable Madam Justice Michelle Crighton**

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**Memorandum of Judgment**

Appeal from the Order by  
The Honourable Mr. Justice S.M. Sanderman  
Dated the 13th day of July, 2018  
Filed on the 29th day of August, 2018  
(Docket: 1603 04719; 1603 05178)

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## Memorandum of Judgment

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### The Court:

[1] The appellants own a unit in the respondent condominium corporation. The underlying issue in this appeal is the liability of the appellants to pay special assessments levied on their unit by the respondent condominium corporation.

### Facts

[2] In May, 2013 the respondent condominium corporation had a reserve fund study prepared by Dynamic Reserve Fund Studies Inc. It recommended monthly assessments to meet the anticipated long term maintenance needs of the condominium, supplemented by two special levies. In October, 2013 the Board became aware of serious cracks in the foundation that had not been identified in the reserve fund study. The Board retained Wade Engineering to recommend a course of action, and ultimately retained Reconstruction Building Services to perform the necessary work, described by the appellants as the “Swale Project”.

[3] The appellants purchased their unit in December 2013. On February 27, 2014 the Board levied a special assessment to cover the anticipated costs of the Swale Project repairs recommended by Wade Engineering. The special assessment funds were to be added to the reserve fund and expended as required.

[4] The appellants objected to the special assessment, and also the monthly condominium fees, and stopped paying them. On March 15, 2016, they issued an Originating Application (#1603-04719) applying for an order terminating the condominium status of the building, and declaring that the special assessment for the Swale Project was unlawful. On March 22, 2016 the respondent corporation commenced an action (#1603-05178) against the appellants for payment of the outstanding condominium fees and levies. The chambers judge dismissed the appellants’ application, and granted summary judgment to the respondent for the unpaid fees and levies.

### The Special Levy

[5] The appellants challenge in particular the special levy assessed to pay for the Swale Project. As the appellants correctly point out, condominium fees must be assessed and collected in compliance with the *Condominium Property Act*, RSA 2000, c. C-22: *Condominium Plan No 8222909 v Francis*, 2003 ABCA 234 at para. 32, 330 AR 297, 19 Alta LR (4th) 263.

[6] The *Condominium Property Act* contains provisions to ensure the long term maintenance of condominium properties. Each condominium corporation must establish a “capital replacement reserve fund to be used to provide sufficient funds that can reasonably be expected to provide for major repairs”: *Act* s. 38. The reserve funds are to be spent on repairs, and after any expenditure there must still be sufficient funds in the reserve fund to meet other anticipated major maintenance costs: *Act* s. 38; *Condominium Property Regulation*, AR 168/2000, s. 27(1).

[7] Each condominium corporation must commission a “reserve fund study” at least every 5 years: *Regulation*, s. 23, 30. That study must be prepared by a qualified person, and must estimate the anticipated repair expenses over the next 25 years. The study must also recommend the amounts that must be raised from the unit owners in order to cover the anticipated expenses. The board of the condominium corporation must then adopt a “reserve fund plan” that will provide “sufficient funds . . . by means of owners’ contributions, or any other method that is reasonable in the circumstances, to repair or replace, as the case may be, the depreciating property in accordance with the reserve fund report”: *Regulation*, s. 23(5); s. 27(1).

[8] The appellants raise several objections to the special levy to pay for the Swale Project. First of all, they appear to object that the Swale Project was not anticipated in the Dynamic Reserve Fund study. It seems clear that the deficiencies in the foundation which led to the Swale Project were a) not identified by Dynamic Reserve Fund Studies Inc., b) were accordingly not included in the 25 year maintenance plan, and c) were also not anticipated in the recommended level of fees and levies. There is, however, no requirement that major maintenance items can only be paid for out of the reserve fund if they were anticipated in the reserve fund study: *Scotwick Realty Services Inc v Condominium Plan No 7510479*, 2003 ABQB 550 at para. 17. Unanticipated major expenses can be funded from the reserve fund, so long as after that expenditure there are sufficient funds remaining in the capital replacement reserve fund to meet the requirements of the reserve fund study: *Act* s. 38; *Regulation*, s. 27(1). It follows that the board was entitled to spend reserve funds on the Swale Project, so long as it levied sufficient additional funds to restore the reserve fund to a suitable level: *Scotwick Realty* at para. 19.

[9] The appellants argue that *Scotwick Realty* was overruled by *Condominium Plan No 8222909*, which held that condominium fees can only be assessed in compliance with the *Condominium Property Act*. *Scotwick Realty* held that there was nothing in the *Act* that prevented the condominium board from raising special levies to fund unanticipated repairs, and in fact the board had a duty to conduct any necessary repairs. *Condominium Plan No 8222909* held that levies must be based on the unit factors, and the fees levied for the Swale Project were allocated in that manner. There is no inconsistency between *Scotwick Realty* and *Condominium Plan No 8222909*.

[10] The appellants' second objection is that the special levy to fund the Swale Project was not recommended in the Dynamic Reserve Fund study. The amounts required by the *Regulation* to be paid into the reserve fund are, however, minimum amounts. There is no prohibition on the board increasing the size of the reserve fund, and indeed a conservative and prudent board might well elect to do so. Specifically, if the board becomes aware of necessary repairs that were missed by the reserve fund study, the board has a duty to supplement the reserve fund accordingly. There was no legal impediment to the board raising funds to fund the Swale Project, even though that levy was over and above those recommended in the Dynamic Reserve Fund study.

[11] The appellants' third objection is that Wade Engineering is not qualified under the *Regulation* to prepare reserve fund studies, and that the Wade Engineering report does not meet the statutory qualifications for a "reserve fund study". Again, the requirement for a reserve fund study, prepared every five years by a duly qualified person, is a minimum requirement. The statute does not preclude the board of the condominium corporation from retaining other experts, to prepare other reports, and to act on those reports if the board considers that to be prudent. The board was lawfully entitled to implement the recommendations made by Wade Engineering.

[12] Finally, the appellants argue that the respondent was required to retain Dynamic Reserve Fund Studies Inc. to investigate the problems of the foundation, and it was not entitled to retain Wade Engineering, at least without a public tendering process. There is, however, no requirement in the *Act* that the condominium corporation only use a single consultant when it comes to repairs and improvements to the building. The Board is entitled to select whichever consultant it feels is most appropriate for a particular task, and negotiate a suitable contract with it.

[13] The appellants also complain of "serious irregularities and corruption" in the completion of the Swale Project. Their complaints focus on the fact that the bids received for the work exceeded Wade Engineering's estimates, and the final cost exceeded the accepted bid due to extra work that was found to be necessary. The appellants seek the appointment of an investigator under s. 67(2)(a) of the *Act*. As the trial judge found, there is no evidence on this record to show a reasonable basis for the appellants' suspicions, and no evidentiary basis to appoint an investigator.

### Conclusion

[14] During oral argument the appellants limited their arguments to the legality of the special assessment for the Swale Project, and abandoned any appeal against the monthly condominium fees, and their challenge to the condominium status of the Empire Gardens Condominium. The appellants have not shown any reviewable error in the trial decision respecting the special assessment.

[15] The appeal is dismissed. The successful respondent is entitled to the costs of the appeal, assessed on Column 1, plus reasonable disbursements and GST. R. 9.4(2)(c) will apply.

Appeal heard on November 27, 2019

Memorandum filed at Edmonton, Alberta  
this 3rd day of December, 2019

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Slatter J.A.

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Authorized to sign for: Veldhuis J.A.

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Crighton J.A.

**Appearances:**

Appellant Sebastian Anthikatt Francis in Person

Appellant Abhirami Ajithbhavanam Padmanabhan in Person (no appearance)

J.M. Frame  
for the Respondents