Citation: Winnipeg Condominium Corporation 479 v Frohlinger, 2022 MBCA 29
Date: 20220404
Docket: AI21-30-09682

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Madam Justice Janice L. leMaistre
Madam Justice Karen I. Simonsen

BETWEEN:

WINNIPEG CONDOMINIUM CORPORATION 479	)	
	)	***J. D. H. King***
(Applicant) Respondent	)	*for the Appellant*
	)	
- and -	)	***T. A. McMahon***
	)	*for the Respondent*
520 PORTAGE AVENUE LTD. and HART MALLIN	)	
	)	*Appeal heard and Decision pronounced:*
(Respondents)	)	***March 23, 2022***
- and -	)	
	)	*Written reasons:*
THOMAS G. FROHLINGER	)	***April 4, 2022***
	)	
(Intervener) Appellant	)	

On appeal from *Winnipeg Condominium Corp 479 v 520 Portage Avenue Ltd et al*, 2021 MBQB 163

SIMONSEN JA (for the Court):

[1] Thomas Frohlinger (Frohlinger) appeals a decision of an application judge (the judge) discharging a mortgage (the 2003 mortgage) held by him against the title to the parking unit (the parking unit) of Winnipeg Condominium Corporation 479 (the Condominium Corporation).

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[2] Following the hearing, we dismissed the appeal with reasons to follow. These are those reasons.

[3] The judge's decision was made after this Court, on an earlier appeal in this proceeding, referred the matter back to him for a determination as to whether it was "just and equitable" that the 2003 mortgage be removed from the title to the parking unit (2020 MBCA 66 at para 85 (the 2020 decision)).

[4] The 2020 decision dealt with a dispute between the Condominium Corporation and the developer of the condominium project (the project), 520 Portage Avenue Ltd. (the developer), as well as its principal, Hart Mallin (Mallin), with Frohlinger as intervener. This Court upheld a decision of the judge (see 2018 MBQB 197) ordering that the title to the parking unit be transferred from the developer to the Condominium Corporation because it was objectively reasonable to conclude that there was a common intention between the purchasers of the condominium units and the developer that the parking unit would be a common element of the Condominium Corporation (see the 2020 decision at paras 65, 75). Both the judge and this Court considered the representations made in the Condominium Declaration (the Declaration) and the Condominium Plan (the Plan) filed by the developer in the Winnipeg Land Titles Office on August 16, 2004 to create the Condominium Corporation—and applied the legal principles set out in *Frontenac v Joe Macciocchi & Sons* (1975), 67 DLR (3d) 199 (Ont CA); and *York Condominium Corp No 167 v Newrey Holdings Ltd* (1981), 122 DLR (3d) 280 (Ont CA) (*Newrey*).

[5] Those principles, grounded in a fiduciary duty owed by a developer to purchasers of condominium units, were succinctly summarized in

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Middlesex Condominium Corp No 87 v 600 Talbot Street London Ltd (1998), 156 DLR (4th) 587 (Ont CA) (at para 39):

> To summarize, *Frontenac* and *Newrey Holdings* stand for the proposition that with respect to the common elements, the declarant is bound not to prefer its interests over those of the group of unit owners. Where the reasonable interpretation of the evidence is that, notwithstanding the registered title, the declarant intended a reasonable purchaser to believe or to justifiably assume that the superintendent's suite was a common element or an asset of the corporation, the declarant will be required to convey the unit to the corporation. If this constituted a departure from established contract and real property law, it was a departure required by the exigencies of condominium ownership.

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[6] In the 2020 decision, this Court also addressed the three mortgages held by Frohlinger against the title to the parking unit. It was determined that, because the developer had no interest in the parking unit once the Plan and the Declaration had been filed, it was not entitled to mortgage the parking unit. Therefore, the two mortgages provided by the developer that were registered against the title to the parking unit in December 2004 and September 2006 were ordered discharged. In discharging those two mortgages, this Court noted the surrounding circumstances that Frohlinger was not at arm's length from the developer "since he was both its legal counsel and an investor in the [project]" and, "[a]s counsel, he was aware of the Declaration and the Plan, having provided a detailed report to the [d]eveloper about their terms" (at para 83).

[7] With respect to the 2003 mortgage, the situation was somewhat different, as it had been registered prior to the filing of the Plan and the Declaration, which formed the basis for the order that the title to the parking unit be transferred to the Condominium Corporation. The 2003 mortgage was

initially registered in December 2003 by one Brian Finnegan (Finnegan) and was transferred to Frohlinger in 2007. In the 2020 decision, this Court recognized that Frohlinger "stepped into the shoes" (at para 84) of Finnegan, but concluded that it did not have a sufficient evidentiary foundation with respect to the circumstances surrounding the 2003 mortgage or its transfer to Frohlinger to determine whether it too should be discharged. This Court noted that it had no evidence as to "the relationship between the original mortgagee and the [d]eveloper, the terms of the mortgage or the assignment, when the mortgage advances were made, the purpose for which the funds were used, or the amount that remain[ed] due under the mortgage" (*ibid*).

[8] After the matter was referred back to the judge, he reviewed the record that was before this Court for the 2020 decision, as well as the further evidence that had been filed, and made a number of findings of fact:

- Finnegan and three others had formed an association for the development of the project. Finnegan was the financier of the project, Mallin was the developer, one Lon Trickett was a designer and contractor, and Frohlinger was the fourth individual.

- Frohlinger was a director of the developer until August 1, 2003, and was involved in the project from its inception as counsel.

- In addition to Finnegan taking the 2003 mortgage as security, he obtained personal guarantees from each of the three other members of the group, as collateral security.

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- In late 2005, Finnegan lost confidence in the project and tried to call in the guarantees on the 2003 mortgage. The parties subsequently settled their differences and, as part of that settlement, the 2003 mortgage was assigned by Finnegan to Frohlinger (and eventually transferred on August 8, 2007). Clause 9 of the formal settlement agreement signed on March 22, 2007 stated:

> [Frohlinger] acknowledges that he has been involved in the [p]roject and that he is fully familiar with the [p]roject and the security held by [Finnegan] on the [p]roject, and that in entering into this Agreement, [Frohlinger] is relying solely on his own knowledge and investigations and not on any representations or warranties made by [Finnegan] as to any aspects of the [p]roject, including without limitation, the financial position of the [p]roject and the security held by [Finnegan] on the [p]roject, the balances owing to [Finnegan] under the security on the [p]roject or the validity, enforceability or priority of the said security.

[9] The judge also concluded that the principles in *Frontenac/Newrey* applied. He determined that those principles meant that not only could the developer not mortgage the parking unit once the Plan and the Declaration had been filed, a person at non-arm's length to the developer who had assumed a mortgage (Frohlinger) taken by a lender who was also non-arm's length to the developer (Finnegan) could not take steps to enforce their mortgage—so that the 2003 mortgage should, therefore, be removed.

[10] In making his decision, the judge considered *Condominium Plan No 86-S-36901 (Owners) v Remai Construction (1981) Inc* (1991), 84 DLR (4th) 6 (Sask CA) (*Remai*). While noting that *Remai* was not on all fours with this case and that the mortgages under consideration in *Remai* were not

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registered prior to the condominium plan, the judge found the decision to be instructive regarding the distinction in the treatment of a mortgage against a condominium property given to an arm's-length financial institution in contrast to a mortgage given to a company related to the developer of the condominium. In *Remai*, the mortgage provided to a company related to the developer was ordered removed, whereas the mortgage provided to the financial institution was not.

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[11] In the present case, the judge concluded that "the fact that the [2003] mortgage predate[d] the [Plan was] not materially relevant because of the non-arm's length nature of the relationship between the original mortgagee Mr. Finnegan and the developer" (at para 12). The judge was also satisfied that no inequity would arise from a discharge of the 2003 mortgage; Frohlinger was also a non-arm's length party, who was aware of the Plan and the Declaration and, having signed the settlement agreement in 2007, "was not an innocent purchaser for value when he assumed Mr. Finnegan's 2003 mortgage" (at para 13).

[12] Although a number of grounds of appeal are raised, Frohlinger essentially appeals on the bases that (1) the judge erred in his interpretation and application of the 2020 decision, and (2) he erred in law and in the application of the law to the facts in ordering that the 2003 mortgage be discharged from the title to the parking unit.

[13] The applicable standard of review with respect to errors of law is correctness. For errors of mixed fact and law, or of fact alone, the standard of review is palpable and overriding error, unless an error of mixed fact and law involves an error relating to an extricable question of law, in which case the

standard of correctness applies to that extricable legal question (see *Housen v Nikolaisen*, 2002 SCC 33).

[14] As for the first issue raised on appeal, Frohlinger takes the position that the 2020 decision precluded the judge from concluding that the 2003 mortgage should be removed from the title to the parking unit. This, he says, is due to the operation of either the principle of *stare decisis* or the principle of estoppel on the basis that an issue already decided was being relitigated. We are satisfied that there is nothing in the 2020 decision that precludes the application of the *Frontenac/Newrey* principles to the question of whether the 2003 mortgage should be removed from the title; this Court specifically declined to determine that issue due to a lack of evidentiary foundation.

[15] We also reject Frohlinger's suggestion that the judge did not follow the direction of this Court as set out in the 2020 decision. He crafted a process that allowed him a complete evidentiary foundation to determine the facts and to apply the law to the facts that he found. The facts that this Court, in the 2020 decision, had identified as potentially relevant to the issue of whether the 2003 mortgage should be discharged were examples only—the judge was not required to consider any particular facts but, rather, the whole of the circumstances. We have no hesitation in concluding that he did exactly what was asked of him.

[16] Frohlinger also contends that the judge erred in finding that he and Finnegan were in a non-arm's length relationship. However, in our view, the key is that they were both non-arm's length to the developer. In any event, we see no error in the judge's finding that Finnegan and Frohlinger were "in association" (at para 13) with one another. Indeed, the evidence well supports the findings he made.

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[17] As for the second issue raised on appeal, the thrust of Frohlinger's position is that the principles in *Frontenac/Newrey* do not apply to these facts and that there is no basis in law for the judge's conclusion that the 2003 mortgage "no longer was enforceable" (at para 14) against the parking unit after the filing of the Plan and the Declaration. As part of this submission, Frohlinger argues that the judge erred by relying on *Remai*. In our view, the judge made no error in his limited use of *Remai*—nor did he err in concluding that the 2003 mortgage, while initially validly registered, was subject to the application of the *Frontenac/Newrey* principles given Finnegan's relationship with the developer; Frohlinger's relationship with the developer, the project and Finnegan; Frohlinger's knowledge of the Plan and the Declaration; and the language of the settlement agreement that he signed. It follows that the judge did not err in concluding that the 2003 mortgage became unenforceable and should be discharged.

[18] The judge's conclusion reflects, and is consistent with, the fiduciary duty owed by a developer to protect the interests of all unit owners, present and prospective, and not to put its own interest in conflict with theirs. Despite the 2003 mortgage being initially validly registered, it would be inconsistent with this fiduciary duty to allow that mortgage to remain on the title to the parking unit when the developer has been ordered to transfer the parking unit to the Condominium Corporation, and both Finnegan and Frohlinger were integrally involved in the development of the project.

[19] As the judge made no reviewable error of fact or law, or in the application of the law to the facts, there is no basis for appellate intervention.

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[20] Therefore, the appeal was dismissed with costs.

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