Action No.: 1101-06054
E-File No.: CVQ11LACAILLE
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

BETWEEN:

CONDOMINIUM CORPORATION NO. 1011382

Plaintiff

and

LA CAILLE EIGHTH STREET INC. and
1293196 ALBERTA LTD.

Defendants

P R O C E E D I N G S

Calgary, Alberta
September 8, 2011

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J.E. Polley	For the Plaintiff
B.C. Yorke-Slader, Q.C.	For the Defendants
A. Williams	Court Clerk

Reasons for Judgment

THE MASTER: This is my decision in action number 1101-06054. The developer of an upscale condominium development in downtown Calgary passed bylaws which provided that insofar as its units remain vacant it had no obligation to pay condominium fees for the first year and didn't have to contribute to the capital reserve fund. Sixteen months later, 33 units remained vacant and the owners of the remaining units seek to have the bylaw set aside as either void or the result of oppressive conduct by the developer. The developer responds that all of the owners had notice of this arrangement when they bought their units, and therefore cannot now complain.

FACTS: La Caille Eight Street Inc., "La Caille", developed a 310-unit conventional mixed-use apartment-style condominium project in Calgary. In April, 2010, the bylaws of the condominium corporation were passed by special resolution. At that time, all of the units in the project were owned by La Caille and it controlled the corporation. The bylaws allocated the common expenses among the owners. Certain defined expenses were allocated among commercial unit owners only on a proportionate unit factor basis amongst those owners. Certain defined expenses were allocated against parking unit owners only on a proportionate unit factor basis. All other common expenses of the condominium corporation were allocated among residential unit owners and office unit owners on a proportionate unit factor basis.

The bylaws, under a heading titled "Developer's Management and Rights", provided an exemption for La Caille from the obligation to pay common expenses as an owner of residential units. The exemption lasted for one year from the date on which the condominium plan was registered or until a unit became occupied, whichever first occurred. Similarly, there was an exemption for contributions to the capital replacement reserve fund until a unit became occupied or sold; however, that exemption had no end date.

There was a problem with the late filing of the bylaws, which was remedied by court order. In any event, the portion of the bylaws in issue was provided to all unit purchasers either as part of the intended bylaws or as part of the adopted bylaws prior to their execution of purchase agreements or within the ten-day recision period stipulated by section 12 of the *Condominium Property Act*, RSA 2000, c C-22, *(CPA)*.

An initial budget of the condominium corporation was also prepared by the developer, and it contemplated contributions being paid by all unit owners in order to raise the income necessary to meet the condominium corporation's anticipated expenses. The evidence does not establish that this document was provided to purchasers to satisfy the requirement of section 13(c) of the *CPA*. It states that the developer, upon entering into the purchase agreement, shall provide:

> (c) the amount or estimated amount of the monthly unit contributions that has been determined on a reasonable economic basis in respect of the unit . . .

Thirty-three units remain unsold and in the developer's name, their common expenses for the first year unpaid and the reserve fund contributions continuing unpaid. Counsel advised that the number of unsold units likely made it impossible for the other unit holders to obtain the votes necessary to amend the bylaws to eliminate the provisions in issue.

ISSUES: The owners raised two issues: are the bylaws in contravention of section 39 of the *CPA* and therefore void; and, do sections 52(b) and (c) of the bylaws contravene section 67(1)(a)(i) and (v) of the *CPA*, and if so, what is the effect?

ANALYSIS: Are the bylaws void?

A condominium corporation as created by the *CPA* owes its existence to the statute, and can only undertake actions that the statute specifically authorizes, *Condominium Plan No. 8222909 v. Francis,* 2003 ABCA 234. If it does otherwise the action is illegal. The owners argue that the statute does not authorize bylaws that exclude the developer from the owners' payment obligations for monthly fees and reserve fund charges; therefore, the bylaws are void.

Originally, the *CPA* provided that charges for the control, management, and administration of the common property or the discharge of the obligations of the corporation were to be paid by the owners in proportion to their unit factors. However, in 2000, the Province of Alberta amended what is now section 39(1) of the *CPA* to permit the assessment of these

charges on a basis other than by unit factors. Section 39(1) now states that the condominium corporation may: (as read)

> (c) raise amounts so determined by levying contributions on the owners
>
> > (i) in proportion to the unit factors of the owners' respective units, or
> >
> > (ii) if provided for in the bylaws, on a basis other than in proportion to the unit factors of the owners' respective units . . .

At first blush, the bylaws in issue are clearly within the statute; however, in *Rizzo v. Rizzo Shoes Ltd.,* [1998] 1 SCR 27 at paragraph 21 the Supreme Court pointed out that: (as read)

> . . . statutory interpretation cannot be found in the wording of the legislation alone.

The Court confirmed in paragraph 21 that now:

> . . . there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The meaning of section 39 of the *CPA* was considered in *Condominium Plan No. 982 25953 v. Fantasy Homes Ltd.,* 2006 ABQB 325 (Master). In that case, the developer was under an obligation to either complete construction of the common property or hold funds in trust for its completion, and it did neither. It owned one unit in the complex and the condominium corporation assessed a special levy against that unit to cover the completion of construction to the common property.

The Court noted that the amendment to section 39(1) did not prescribe either expressly or generally in what circumstances the condominium corporation can make an assessment other than by proportional contribution. Therefore, said the Court, the appropriateness of such an assessment must be consistent with the purpose and objectives of the *Act.*

Footnote 1: These comments were considered with approval in *934859 Alberta Inc. v.*

Condo Corp No. 0312180 2007 ABQB 640, and *Condo Corp No. 0825873 v. 1246153 Alberta Ltd.*, ABQB 718 (Master).

Looking to the provisions of the *CPA*, and in particular section 11, which provides for a duty of fair dealing, the Court concluded that on the basis of fairness the circumstances permitted the allocation of all of the assessment against the developer's one unit. The bylaw was not ultra vires section 39 of the *CPA*. The Court's comments on the nature of the *CPA* and section 39 were considered in the two cases I just cited. However, in *Fantasy Homes*, as the Master noted with some puzzlement, there was no application under section 67 of the *CPA* asking the Court to examine the conduct of the parties. As a result, the Court was required to deal with the allegedly questionable conduct by way of consideration of the vires of the bylaw under section 39(1).

This matter came back before the courts in a convoluted series of applications which included an application under section 67 of the *CPA,* and the comments of the Master ultimately received consideration by the Alberta Court of Appeal, 2010 ABCA 39. The Court refused to consider whether the levy imposed on the owner was allowable under section 39 of the *CPA*. It said that the question raises serious issues of statutory interpretation and policy which it declined to determine at that time, and directed the matter to trial. These comments of the Court of Appeal mean that the decision of the Master and the cases that have adopted his comments are of limited usefulness.

In the case before this Court, the parties are asking this Master to tread where the Court of Appeal declined to readily venture. While this Court is quite prepared to determine the question before it, the arguments provided did not fully explore the factors necessary to undertake the kind of statutory and policy analysis the Court of Appeal found the issue requires. For example, no information was provided as to the history of the legislation and the relevant amendments, the legislative intent behind the legislation and the amendments, nor were other aids to interpretation, if they exist, mentioned.

No analysis was done of the policy implications that could follow a determination that the bylaw is or is not outside the ambit of section 39. For example, outstanding condominium fees enjoy a priority status to other registered encumbrances. Should that factor play a role in any consideration, and if so, how? The arguments provided by the parties did not adequately explore the issues presented by the question to be determined; therefore, I have reserved my decision on this question pending further submissions.

Do subsections 52(v) and (c) of the bylaws contravene section 67(1)(a)(i) and (v) of the *CPA,* and, if so, what is the effect?

Before turning to the more recent consideration by the Courts of section 67, the comments

of the Alberta Court of Appeal over 25 years ago in *Terrace Corporation Construction Ltd. v. Condominium Plan 752-1207 (Owners),* (1983) 26 Alta L.R. (2d) 147 (Alta C.A.), are of assistance. At that time, the legislation did not impose a duty of fair dealing on the developer. The Court found that there was a fiduciary duty owed by a developer to the purchasers. In that case the Court found that even though the purchasers were aware of a long-term lease the developer had granted to itself over certain parking areas, the developer could not sell the rights to those parking spaces. The Court found that the lease which was provided to all purchasers in conjunction with an explanatory letter did not make it clear that the intention was to permit commercial exploitation by the developer of the parking facilities.

Section 11 of the *CPA* was enacted in 1998 and is in force today. It states that:

> Every agreement to sell a unit imposes on the developer selling the unit and the purchaser of the unit a duty of fair dealing with respect to the entering into, performance and enforcement of the agreement.

Section 67 provides for remedies under the *Act* for conduct that is improper. "Improper" is defined, and the owners rely on section 67(1)(a)(i) and (v). Subparagraph (i) refers to conduct that is in non-compliance with this *Act,* while subparagraph (v) refers to the exercise of the powers of the board by a developer in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party or a purchaser or a prospective purchaser of a unit.

Under section 67(2), when the Court is satisfied that improper conduct has taken place, it may grant certain remedies, including: (as read)

> . . . any other directions or make any other order that the Court considers appropriate in the circumstances.

The components of section 67 were defined by Chrumka J. in *934859 Alberta Inc.* in relation to an application by the owners of units on the first floor to overturn the bylaw allocating expenses on a proportional basis. They argued that the first-floor owners did not have the benefit of all of the common areas, and therefore the board had acted improperly in passing the bylaw. The board in that case was elected by the owners.

Chrumka J. commenced his analysis by noting that the Court should defer to elected boards as a matter of general application. He then defined conduct that is "oppressive", "unfairly prejudicial", or "unfairly disregards the interests". "Oppressive conduct" is conduct that is burdensome, harsh or wrongful, or which lacks probity or fair dealing.

Conduct that is "unfairly prejudicial" means acts that are unjustly or inequitably detrimental. Conduct that "unfairly disregards" the interests of an interested party, purchaser or prospective purchaser, is conduct that is unjust and inequitable.

Chrumka J. held that the evidence indicated that the first-floor owners did, in fact, have access to the common areas, and therefore there was no evidence of improper conduct by the duly-elected board in assessing fees proportionately.

In *Condo Corp No. 0825873 v. 1246153 Alberta Ltd.*, 2010 ABQB 718, the Court considered conduct relating to an alleged contract by the developer. In that case, the developer was left with a large number of unsold units and outstanding fees for unsold units that exceeded $100,000. A representative of the developer argued that there was a special fee agreement entered into between it and the condominium corporation permitting it to pay only $100 a month for each unsold unit.

The Court noted that the representative alleging the agreement was both a director of the developer and the condominium corporation at the time the agreement was made. There was a clear conflict of interest and the actions of the developer were found to be "oppressive, unfairly prejudicial, and unfairly disregarded the interests of the condominium corporation".

The agreement, assuming it existed, was found to be void.

Ontario has seen considerable litigation in relation to condominium developments, and a number of cases have considered the propriety of certain actions of the developer. In *Carleton Condominium Corporation No. 106 et al v. Mastercraft Development Corp. Ltd.*, (1985), 49 O.R. (2d) 638 (C.A.), the issue was whether the developer was entitled to the proceeds from the sale of certain outdoor parking spaces that were part of a condominium development. The declaration filed by the developer said that the developer was entitled to assign its rights to the extra parking spaces to any other unit owner, which it then did for a price.

The Court held that both the declaration and the *Act* must be examined, and in this case there was nothing done by the developer that infringed the legislation. Furthermore, the declaration specifically authorized Mastercraft to deal with the surplus spaces. It was therefore entitled to keep the proceeds it received from the excess parking spaces.

In *Peel Condominium Corp. No. 417 v. Tedley Homes Ltd.*, [1997] O.J. No. 3541 (Ont.CA), the Court considered whether there was a fiduciary duty owed by the developer to the purchasers and if it had been breached. In that case, the developer made full disclosure of the fact that it retained ownership of the guest and superintendent's suites.

While it controlled the condominium corporation, it entered into a purchase agreement with, in essence, itself to buy those suites from the developer, ie: itself, on terms over time. There were to be no assessments for common area charges. Once the owners took over the condominium corporation, payments were made pursuant to that arrangement for almost two years.

Questions then arose. The owners alleged the units were part of the common elements of the building and the contract should not have been signed. The Court of Appeal found that each owner agreed by way of their purchase documents that the superintendent and guest suites were not included in the purchase price. The disclosure statement and declaration made this "abundantly clear". The fact that the first directors did not formally disclose their obvious interest in the transaction was inconsequential. All they had done was organize the affairs of the condominium in the manner anticipated by the declaration and agreed to by the purchasers of the units.

Furthermore, said the Court, there was no breach of a fiduciary duty. The acts of the first directors could not be seen as being contrary to or inconsistent with the interests of the unit holders. The arrangement, the Court noted, was not of sole benefit to the developer. The condominium corporation and the owners benefited from the availability of the guest suites.

The Ontario Court of Appeal in *York Region Vacant Land Condomium Corp. No. 968 v. Schickedanz Brothers Limited,* (2006) 50 R.P.R. (4th) 79 (Ont.CA), considered whether a developer acted oppressively in establishing bylaws that assessed the cost of a road only against those parcels of land that were being developed. The legislation in that case, the *Condominium Act* 1998 SO c.19, as amended, provided that the developer file a declaration that included a statement setting out the percentage of the common property assigned to each unit and the percentage the owner of each unit will contribute to the common expenses. The declaration made it clear that only the developed parcels would pay for the maintenance of the road.

The Court held that despite the fact that the bifurcated formula for contributions clearly favoured the interests of the developer at the expense of the unit holders, it did not necessarily follow that such conduct was oppressive or highly prejudicial. The formula was created before the unit holders purchased their property and was properly disclosed to them. They had the right to rescind their purchase agreements. In the course of its reasons, the Court noted that the oppression remedy could be used to protect stakeholders from both unlawful conduct and conduct that, while technically legal, could be oppressive. That was not the situation here, said the Court. There was no devious purpose, but a reasonable and legitimate business purpose which related to the staged nature of the development.

The most recent decision cited by the parties is *Metropolitan Toronto Condominium Corporation No. 1272 v. Beach Development (Phase II) Corp.*, [2010] L.J. 5025 (O.S.C.). In that case, the condominium corporation sought a declaration that the developer had acted oppressively. In considering the nature of the oppression remedy the Court said that the remedy protects only "legitimate" or "reasonable" expectations and "not individual wish lists". It relied on the two-prong test for oppressive conduct in relation to a corporation found in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69.

In that case, the Supreme Court held that what is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. To determine if oppression has occurred, the Court must address two questions. Does the evidence support the reasonable expectations asserted by the claimant? If it does, then does the evidence establish that the reasonable expectations were violated by conduct that falls within the definition of oppressive conduct?

The analysis of the first question should be both objective and contextual, and can include a consideration of factors, such as general commercial practice, the nature of the corporation, past practices, the relationship between the parties, steps the claimant could have taken to protect itself, and representations and agreements. If the reasonable expectations are established, the Court must then consider whether the conduct complained of amounts to oppression, unfair prejudice, or unfair disregard.

Using this test, the Ontario Supreme Court considered whether the absence of a cost-sharing agreement for shared services between condominium owners and freehold owners amounted to oppressive conduct. It examined the disclosure documents and declarations, the bylaw, and the limited cost-sharing agreement. The Court noted that the applicants had common-law remedies that they could choose to pursue, and held that there was no reasonable expectation that there would be a cost-sharing agreement in existence.

The Court went on to note that the legislation was not consumer protection legislation. A balance must be found between that goal and the commercial realities of the condominium industry. The objective of consumer protection, said the Court, is found in the requirement for full disclosure, which was made.

In *Condo Plan No. 86-S-36901 v. Remai Construction (1981) Inc.*, [1992] 1 W.W.R. 66 (Sask CA), the developer registered the caretaker's suite as a separate unit, sold it to the condominium corporation, and took a second mortgage back, all while he still controlled that corporation. The developer did not register the plan until over half of the units had been sold. The plan showed the caretaker's suite as a separate unit. While the units were being sold, the suite was occupied by a caretaker hired by the developer. It was identified

on the site and on the plan as a caretaker's suite. It was beside and part of an office and recreation area, both of which were common areas. Purchasers were not told that their corporation would be required to pay an additional price for the unit. Some purchasers had been told by the developer's sales agents that the suite was part of the common area, while others assumed that to be the case. When the condominium corporation was taken over by the owners, they commenced this action.

The Court noted the comment of the Ontario Court of Appeal in *Frontenac Condo Corp. No. 1 v. Machiochi & Sons Ltd.,* (phonetic) (1975) 11 O.R. (2d) 649 at page 652, that an average person understands a condominium to mean, among other things, that "no one, including the developer, would be in a position to put his economic interests against the interests of the group so far as joint ownership, management, or enjoyment of the property was concerned, save through a mortgage or similar interest."

This principle, the Court noted, is also found in Anger and Honsberger on Law of Real Property, 2d. ed. Canada Law Book Inc. 1985, at section 1994, where the authors state that the developer is not merely a vendor, he is a promoter subject to fiduciary duties which start as soon as this developer starts to sell the units. The Court held that a developer breaches its fiduciary duty by putting its own interests in conflict with those of the unit holders. In that case, it breached its fiduciary duty by failing to disclose that it proposed to extract an additional price for the caretaker's suite, by registering a plan showing the suite to be a separate unit belonging to the developer rather than as part of the common property, by causing the condominium corporation to purchase and mortgage the caretaker's suite, and by taking the purchase price itself without the knowledge or consent of the unit holders.

This Saskatchewan case - a jurisdiction with legislation similar to Alberta's - and the Ontario case law, was relied upon by La Caille to argue that disclosure had been made and therefore no claim under section 67 could be made.

These Ontario cases focus on the requirement of the developer to make disclosure when it has, to some degree, favoured its own interests while it controlled the condominium corporation. The disclosure requirements found in the Ontario legislation are much more extensive than those found in the Alberta legislation. In Ontario, a declaration must be filed that includes, among other requirements, a statement as to the proportions expressed in percentages allocated to the units in which the owners are to contribute to the common expenses. Another document, a disclosure statement, is also to be provided to each purchaser of a unit containing information that is considered to be of importance to most purchasers. This disclosure statement includes a table of contents to the bylaws and must include "a statement whether any unit is exempt from a cost attributable to the rest of the units or proposed units".

In Alberta the developer must provide a number of documents to a purchaser or prospective purchaser, including the bylaws and the amount or estimated amount of the monthly contributions. However, unlike Ontario, there is no table of contents required that points the purchaser to where certain pertinent provisions can be found in the bylaws, nor is there a statement required as to the relief provided to anyone from the payment of condominium fees.

The bylaws were provided to the purchasers in this case as required by law. The bylaws have no table of contents and the pertinent provisions are found on page 47 in section 52. It is unclear what was provided in relation to the condominium charges to be paid by each unit.

Was this conduct oppressive?

The analysis used in relation to corporate oppression is fitting for an application under section 67. Therefore, the first thing to determine, as stated by the Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders,* is does the evidence support the reasonable expectations asserted by the claimant. The onus is on the claimant to set out its reasonable expectations.

In this case, it has not done so. The affidavit evidence filed is brief and makes no mention of the expectations of any of the parties. It is unclear if some or all of the owners were aware of the holiday from payment given to the developer, and negotiated their purchase prices accordingly. As there is no evidence of the expectations of the owners who have assumed control of the condominium corporation, the application must fail. Therefore, the application pursuant to section 67 of the *Act* is dismissed.

The application pursuant to section 39 of the *Act* is reserved pending further submissions by counsel. As the criteria for the filing of new evidence on an appeal from a Master's decision changed in July of this year, and this matter is coming back before the Court to consider section 39 of the *Act,* the Court is prepared upon the filing of further evidence to reconsider the application under section 67, should the parties prefer to proceed in this way.

Counsel, are there any questions?

MR. POLLEY: I think you were abundantly clear, Master Hanebury. Thank you.

MR. YORKE-SLADER: Thank you, Ma'am.

THE COURT: All right. I usually reserve my right, if you order a transcript, to read the transcript before its release, because I made some ums and ahs; however, I am going to be out of town until October 9th, so I don't know if you would prefer that I not reserve --

MR. POLLEY: I think it's fine.

THE COURT: -- that right. Or if you want to have a chat?

MR. YORKE-SLADER: No.

MR. POLLEY: No, that -- it's fine. (INDISCERNIBLE) --

MR. YORKE-SLADER: There is no --

THE MASTER: It's fine?

MR. YORKE-SLADER: -- urgency in the matter.

THE MASTER: All right.

MR. POLLEY: We -- we can await your return.

THE MASTER: And --

MR. YORKE-SLADER: Why -- why don't you reserve your right and -- and if we order it, we'll --

MR. POLEY: We'll wait.

THE MASTER: Then I'll --

MR. POLLEY: That's correct.

THE MASTER: -- tidy it up a bit? That would be fine. It was a rather long stretch to read at quarter-to-nine in the --

MR. POLLEY: Mmm hmm.

THE MASTER: -- morning, having had only one cup of coffee.

Very interesting case, gentlemen, thank you.

MR. POLLEY: Thank you.

MR. YORKE-SLADER: Thank you, Ma'am.

PROCEEDINGS CONCLUDED

Certificate of Record

I, Amanda Williams, certify this recording is a record made of the oral evidence in the proceedings held in Courtroom 903, in Calgary, Alberta, at the Court of Queen's Bench, on Thursday, September the 8th, 2011, and that I was the court official in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Jeannie Rumary, certify that

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