Case Name:

Condominium Plan No. 822 2630 v. Danray Alberta Ltd.

Between
The Owners: Condominium Plan No. 822 2630,
plaintiff, and
Danray Alberta Ltd., Danny Taran, John Doe No. 1
and John Doe 2, defendants, and
584090 Alberta Ltd., Re/max Real Estate (Edmonton)
Ltd., Sheldon Wolanski and Mark Kornel, Third
Parties, and
Linda Milton, Donna Daly, Ken Charters, Darcy
Milnthorp, Jeanne Cummins, Al Milton, Jim Allan,
Sylvia Hortie, Corinne Urch and Debbie Ellis, Third
Parties, and
Lisa Johnson and James Butler, Third Parties, and
Michael Lee, Third Party

[2005] A.J. No. 756
2005 ABQB 455
Docket No. 9703 06875

Alberta Court of Queen's Bench
Judicial District of Edmonton
Sulyma J.

Heard: December 14, 2004.
Judgment: June 21, 2005.
(155 paras.)

Counsel:

G. James Thorlakson, (Miller Thomson LLP), for the Plaintiff

Louis M.H. Belzil, Shores Belzil, for the Defendants

REASONS FOR JUDGMENT

SULYMA J.:—

I. Introduction

¶ 1 The condominium project known as "Whispering Pines" was constructed in south Edmonton in 1982. Although a Condominium Plan was registered, the units were rented. In 1988 the Defendant, Danray Alberta Ltd. (Danray) purchased the land and residential structures, and operated the project as a rental project. In 1994 the principal of Danray, Mr. Danny Taran, was approached by two Edmonton realtors who proposed that Danray sell the land to a numbered company and the realtors would in turn market the condominiums to individual purchasers. Danray and the realtors entered into the sale agreement in January 1994, and the project was then marketed to individual purchasers, with the sale to the realtors closing on August 1, 1998. The owners of the condominium now sue Danray and Taran on the basis that they did not properly maintain the project, and failed to establish an adequate contingency reserve fund as required.

¶ 2 The Defendants issued a number of third party notices. Firstly, a third party notice as against the numbered company Re/Max Real Estate Edmonton Ltd. and the two realtors. By the time of trial, the numbered company had been struck and the third party action against the two realtors was not pursued at trial. Danray also issued third party notices as against several of the condominium owners who had been members of the Board of Directors of the condominium after August of 1998. However, this third party action was also not pursued at trial. The liability of Danray is in issue. The Plaintiff seeks damages for repairs of deficiencies in the sum of $480,644.00 and interest.

II. Evidence

A. Agreed Facts and Exhibits

¶ 3 The parties prepared a Statement of Agreed Facts with 66 attached exhibits entered as Exhibit 1. The documents included a copy of the documentation effecting the sale of the project to the numbered company and examples of contracts which effected the sale of individual condominiums to individual purchasers. In addition, the minutes of meetings of the condominium board were contained within Exhibit 1.

¶ 4 Exhibit 3 was a binder entered by consent, containing invoices and other documents relating to the repair work done at the condominium project after August 1, 1994.

Corinne Kozak

¶ 5 Ms. Kozak purchased her condominium from 584090 Alberta Ltd. by an agreement dated May 24, 1994. She did not inspect the common property of the project prior to purchase. She stated that an assessment had been performed by the bank from whom she was obtaining financing. She attended the first general meeting of the owners, held Wednesday, September 7, 1994 during which a Board of Managers was elected and the 1994/1995 budget, which all of the owners had received in their purchase packages, was approved, was accepted. Kozak was not on the original Board of Managers of the condominium corporation. However, she did become elected to the Board of Managers for the 1996/1997 fiscal year at the annual meeting held September 10, 1996.

¶ 6 Kozak testified that after the owners purchased their units they could see that some work was required on the common property. It was not, however, until the summer of 1995 that the Board gave notice to the owners of fee increases, and it was then that she first became aware of problems with respect to the common property, and that the numbers in the 1994 budget were insufficient to make required repairs.

¶ 7 She specifically described the problems, noting that water was coming directly into furnace

rooms located on a number of upper decks and that water damage to the furnace rooms was evident. She testified that the Board hired Western General Contracting Inc. to repair some of the decks. The Board's plan had been to repair the most severely damaged decks first because of safety issues, as there was rot on the decks and in the stairs. Further, many of the units primary access to the unit was through the deck. She described that by February of 1997 water damage was being sustained within actual units. This was as a result of ice damning on the roof.

¶ 8 At the February 20, 1997 meeting of the Board of Managers held the managers were advised by an owner from the Quail Ridge condominium project across the street that it had similar problems. The members of the Quail Ridge Board further described the repair process that was initiated by Quail Ridge, including the preparation of a formal engineering report and advised the Whispering Pines Board of legal action taken by Quail Ridge. The Quail Ridge Manager recommended the Whispering Pines Board contact their lawyer and then an engineer to undertake a fund study. The Whispering Pines Board voted to contact two engineering firms and put forth a proposal for conducting a reserve fund study for Whispering Pines and to contact the lawyers that were representing the Quail Ridge project.

¶ 9 Eventually the Whispering Pines Board retained Wade Engineering Ltd. to perform a reserve fund study. The report dated May 1997 reported on repairs necessary and provided estimates of repair costs and replacement procedures, with a view to advising the Board of an appropriate reserve fund to cover present and future repairs.

¶ 10 Kozak stated the Board, on receipt of the Wade Report, considered borrowing to effect the repairs. Ultimately the Board assessed additional fees against individual owners and commenced repairs. Operating capital was used to start repairs, and as additional fees were collected, the money was spent on repairs.

¶ 11 In cross-examination Kozak acknowledged that she purchased her condominium from the numbered company and had no knowledge of the Defendants, and that the purchase documents she received included a proposed annual operating budget for the Board and an estoppel certificate. The certificate stipulated that the capital reserve replacement fund was nil and that the purchasers had undertaken to hold in trust and pay to the condominium corporation the sum of $300.00 from the sale proceeds of her unit and every other unit sold as an initial contribution toward the capital reserve replacement fund. She acknowledged that at the first Board Meeting there were representatives of Argon Group Ltd., a property manager for the Board and that a budget was approved. She also acknowledged that indeed it was Argon that provided the Board with Wade Engineering Ltd.'s name. Before that the Board had never asked Argon why it had not done a reserve fund study. Before the spring of 1997 the Board was operating under a 1995 reserve fund study. She acknowledged the majority of repair work on the complex was done in 2000 and also that at that time wholesale repairs were effected.

Donna Daly

¶ 12 Ms. Daly had moved into the project as a renter in 1982, and purchased her unit in 1994. She described a similar process to that described by Kozak, which was that over time the members of the Board began to realize that they had to deal with a major expense, and that they needed a bigger picture to work with on the issue of repair costs. She acknowledged that the Board had a capital reserve study prepared in 1995, but stated that it had been prepared by two lay Board members. She stated that during that same period the Board was increasing condo fees by 50%, using that study to back up the increase.

¶ 13 Daly stated that in hindsight the Board members were naive and lacked sufficient professional guidance. There was no one who understood the big picture with respect to operating the project and the

nature of the repairs required. She described the advice the Board received from Argon as property manager as advice on how the Board could juggle numbers and also on which repairs to effect.

¶ 14 By 1996 the Board knew it had major ongoing problems with decks and stairs and that it needed outside help. The Board hired Western General to get the water off decks. That in turn led Western General Contracting Inc. recommending which decks needed repair on a priority basis.

¶ 15 Then, by March of 1997, the Board realized that it needed an actual professional reserve fund study and retained Wade Engineering to prepare it. The Board also wished Wade to oversee repairs, as it was not certain that a former contractor or their present contractor was effecting repairs correctly. She confirmed that the Wade Study indicated that the Board needed $400,000.00 to $500,000.00 in its reserve fund. That in turn necessitated an immediate special assessment and further required three to four special assessments of $83,000.00 being levied over a number of years. Ultimately, the decision as to how to schedule repairs was made on the basis that the condition of the roof soffits caused ice damning over the winter of 1997 and that therefore by the summer of 1997 those repairs were immediately necessary. Although the decks had been previously considered to be in critical condition, and some had been repaired before that time, the Board felt that that contractor had not got at the root problem, which the Board believed to be rotten decks and siding. Daly contrasted Western Contracting's work to that done by Wade Engineering in 2000, noting that Wade checked the posts once they were revealed and checked within decks for rotten wood.

¶ 16 She testified that the Board hired A.P.B. Aluminum Building Products to completely dismantle and rebuild each deck. The deck replacement invoices totalled $192,716.91 and that firm agreed to provide the Board with some financing. A.P.B. opened the decks and the furnace walls, replaced any rotten joists, redid the deck surface with new plywood, restructured the slope of the decks, and applied Duradeck. It also completely rebuilt the stairs.

¶ 17 She testified that all the shingles on the roofs were removed and a major part of the roof decking was also repaired. Water diverters were installed to course water into the eaves troughs. The amount for roof repairs totalled $55,392.84. Some of the repair items claimed were described by Daly as for odd jobs that became necessary between January and March 1997 as a result of water leakage.

¶ 18 The claim for window repairs is $101,825.70. Daly testified that window casings and sills had become rotten, and the sections with exposed windows in certain living rooms required replacement. There were also exposed windows on the edges of the buildings, and finally, the wood windows in place were sliding units and therefore not secure. The Board, therefore, replaced all of the wood windows in all of the condominium units with PVC windows.

¶ 19 The Board paid an engineering consulting fee of $18,468.20, and $23,885.66 was paid for furnace room repairs as individual problems with some furnace rooms came to light during repairs. The whole complex was painted for $19,442.97, as buildings had not been painted for five years, and the Board felt it necessary to protect ranch walls. Insulation replacement cost was $11,843.33 as all of the attics were under-insulated. Soffits and eaves troughs were installed for $13,654.75. Finally, the Board paid $8,500.08 to repair a parking area that had a tree root infringing into a parking stall and the complex parking lot was also re-sloped.

¶ 20 Cross-examination of Daly confirmed that Danray had painted the buildings in 1993 and that it had done some deck repairs. Daly confirmed that on purchasing her unit she did not receive a budget from the vendor numbered company, but rather received a proposed budget from the Condominium Corporation. She confirmed that for a period of time up until 2000, the Board was assisted by Argon and

its successors as property manager and that initially Argon's advice had been to make as many repairs as possible the responsibility of individual owners. Daly was at a Board Meeting on June 7, 1995 when a quote for roof work for $29,000.00 was presented and the Board decided to defer any decision on the roof until a budget was prepared and an analysis was done on how the Board could best pay the cost. However, in testimony, she did not recall that meeting and discussion. She acknowledged that the Board and owners themselves caulked windows in that same period rather than spending $3,500.00. She further acknowledged that the eventual roof replacement cost was $55,000.00, when the original replacement quote had been $29,000.00 in 1996 and 1997.

¶ 21 She acknowledged the original reserve had been $15,900.00 and that no disbursements were incurred during the first year of operation. Therefore, with continuing condo fee contributions, by 1996 the Board had a $44,535.00 reserve fund. In that same year the stairs were replaced for $1,100.00, although she could not account for that sum in unaudited financial statements prepared for the year-end July 1998. Nor could she account for certain differences in capital expenses shown within pages of the same unaudited statements. She acknowledged that the financial statements indicated minor disbursements for maintenance in the same year and that the closing balance of the fund for 1998 was $34,120.00. That in turn did not appear to be reconciled in the next financial statement for the year July 31, 1999. When asked whether the Board had ever questioned the property manager Argon about these discrepancies, she could not recall if it had.

¶ 22 She acknowledged that in August 1995 the Board was given a quote to effect stairway repairs in a sum not to exceed $3,000.00. This was contrasted with the cost of the eventual stairway repairs of $48,002.40. She acknowledged that over time Argon charged the Board management fees of $87,000.00. She maintained that when Western Contracting effected repairs in 1996, it was the Board's belief that that work had not got to the root of the problem. The advice to redo that work came from Wade Engineering, who said that the work had not been done to specifications that would have been acceptable to them. She acknowledged that Western and A.B.P. had done quite extensive work on decks in the 6-year period before the replacement repairs effected in 2000 under Wade Engineering's direction.

Allan King

¶ 23 The Plaintiff called Allan King of Wade Engineering Ltd. as an expert witness. King stated he and his firm had extensive experience in preparing specifications for condominium building repairs and in effecting such repairs. Further, he had extensive experience in providing consulting engineering services to overview building repairs. Finally, that he had extensive experience in preparing reserve fund studies. He described the purpose of such a study. It allows for an assessment of construction deficiencies and provides for an adequate reserve fund to repair such deficiencies over time. Part of the analysis is to provide a spreadsheet which establishes an appropriate cashflow for individual matters of repair.

¶ 24 In cross-examination on his qualifications, King admitted he was not an expert in property management. I qualified King as an expert witness. with the qualifications and experience to provide expert opinion evidence assessing construction deficiencies and appropriate reserve funds.

¶ 25 King described a reserve fund study as a document that looks at a condominium project to determine how much money a condominium board has in its fund to effect repairs and to provide for capital maintenance and to establish the fund requirement for the future. Such studies are necessary as they allow a board to protect the property and protect owners against large special assessments, and are crucial as a planning tool. He stated that most special assessments are triggered by the need to repair large structural components of a condominium complex. King stated it is not an appropriate practice for boards to merely repair deficiencies as they become apparent, because this "pay as you go" method may

not be contemplated by a fund.

¶ 26 He discussed the elements in the analysis of his reserve fund study. First, the effective age of components and their remaining life was assessed. Then, the present fund of the Board was compared to his analysis of the need for and the cost of annual future replacements of components. He concluded there was a resulting shortfall in the fund for Whispering Pines in the sum of $441,575.00. He concluded the previous repairs had been erratic and on a "pay as you go" basis. King also analyzed the result if the fund contribution was $3,800.00 per year. In his opinion, a $32,000.00 per annum contribution would be necessary to cover further replacement costs. It was his opinion that the initial reserve fund sum of $15,900.00 was a totally inadequate sum since that sum would not cover major work required in one year alone. He concluded that if the Board proceeded on a proposed reserve fund contribution of $15,900 annually, then by the year 2019 there would be a shortfall of $2,102,633.

¶ 27 King believed that he initially went to a Board Meeting in 1997. He was eventually retained by the Board to prepare a reserve fund study, prepare specifications, oversee tender calls, and inspect work in progress. To prepare the study, he obtained the building plans, and performed a site inspection to identify repairs items needed to be accounted for in the reserve fund. His goal is to determine from that inspection and that information the failure date for any individual component. With respect to each component of the building, for instance the roof, his inspecting staff ascertained its condition, its longevity, and the cost of replacement. Then, he determined the appropriate cash stream to cover such necessary repairs in the future. King described some structural components that would not have a life cycle, and therefore not need to be replaced, such as insulation. On the other hand, a component such as a roof would have a 20 to 25-year lifespan, depending on the nature of the roof.

¶ 28 In this case, his inspection determined that the majority of the balconies on the units were not particularly waterproof. Green astroturf had been stapled on plywood and caulked but this was temporary waterproofing. He determined the furnace rooms were quite damaged, because the wood studs in the furnace rooms and on the decks allowed leakage. Further, ice damning had occurred and that allowed additional water into the furnace rooms, causing rot. In taking the decks apart, he found extensive rot and indications that water was getting past the balconies and into the furnace rooms. With respect to the surfaces of the balconies, his inspection crew noted soft areas and holes and rotting conditions in plywood and sheathing on some of the decks. It was his opinion that the type of repairs that had been effected to the date of his 1997 inspection had consisted of merely putting carpet on top of the plywood which was old, rotten and in fatigue.

¶ 29 The shingles on the roof were in extreme distress, with a consistency of almost bare felt paper and well beyond their useful life. Beyond the aesthetic problems with the shingles, leakage was in turn rotting roof decks below the roof. It was his opinion that the roof needed replacement. Attics, in addition, were significantly underinsulated which caused further ice damming.

¶ 30 King observed drywall tape and believed that it was the result of a seasonal-type of repair with an application of thin peel and stick. Eighty percent of the beams had rot, not evident from the front, as a result of water leaking behind guard rails. There were also places where there was leaking around the plywood nailed to the beams. He stated that a contractor would not know the extent of the rot until the beams were actually exposed. Only those that were found to be rotten were replaced.

¶ 31 King, in later dismantling the decks, noticed multiple layers of repairs which indicated to him that there had been previous attempts to address ongoing problems with water. It was his view the previous repairs were not appropriate. Rather, a competent contractor would remove wet plywood rather than place new plywood over old. Otherwise, water would be trapped between the two layers.

¶ 32 With respect to the roof, he did note that there were some repairs at the perimeter of the roof which indicated that the previous owner had experienced some ice damming. This could also be confirmed by rotten decks at the perimeters below these portions of the roof. It was his overall conclusion that the Whispering Pines project was in distress and that major repairs could not be delayed.

¶ 33 King testified that during the time that Danray was the project's owner, he met with Taran and Diane Anderson of Sunridge, the property manager, and recommended major repairs. Taran draw up specifications for the recommended repairs to be done for free. As King indicated he would not do the work for free, that was the end of his discussions with Taran while Danray was still the project owner.

¶ 34 Wade Engineering Ltd. tendered the first phase of window repairs, noting that some windows were worse than others. King advised the Board to replace the more exposed windows first. However, he acknowledged that it would be more cost effective to replace all the units at one time. He was not involved in making that decision, he merely performed inspections of the A.B.P. work. King further outlined his firm's involvement in various other repairs that were eventually effected. For purposes of this judgment I do not find it necessary to detail that evidence.

¶ 35 With respect to repairs that had been done to the condominium to 1997, he states that an examination of invoices for those repairs alerted him to the fact that the same problems occurred over time. He would expect this would result in investigating, and repairing problems with a plan in mind. Instead, these invoices indicated that only partial repairs were effected by the previous owner.

¶ 36 King concluded that the Board needed $447,336.00 as a reserve fund in 1994, given his analysis of the repairs that were required at that time. This figure was based on a "reasonable and sufficient" model of assessment, which provides for a fund to just cover present and future obligations. Indeed, had the equity replacement model been used, the fund necessary would have been as high as $600,000.00.

¶ 37 King was asked whether the new Board, after 1994, ought to have acted faster in assessing the need for repairs and an appropriate reserve fund. It was his view that their biggest problem at that time was money, along with lack of education. Also, he noted the Board could not have raised $400,000.00-plus at that time, in any event. All in all, King's opinion was that a reserve fund ought to have been set at a significantly higher sum than $15,900.00 in 1994, even had the buildings been brand new at the time.

¶ 38 In cross-examination, King acknowledged the style of construction at Whispering Pines was consistent with other condominium projects built throughout Edmonton in the early 1980s. He acknowledged most of his site information came from Joe Pound and Doug Bauer, employees who did most of the investigation and wrote portions of the report. King could not say for certain whether he inspected the roofs in 1997, but stated that from 1997 to 2000, the end of the job, he was on site approximately ten times. Bauer was responsible for investigating and assessing repair requirements and costs for the decks and roof, and Pound was responsible for the assessment of the windows. There was a similar division of labour between Pound and Bauer for other items such as easvestroughs, soffits, and painting.

¶ 39 Once repairs were commenced, contractors' work was supervised by Wade Engineering employees, not King personally.

¶ 40 King acknowledged a report he prepared in September of 1990 for Anderson of Sunridge regarding roofs at Whispering Pines, and acknowledged that at that time he did not discuss the issue of ice damming nor did the report itself refer to ice damning. Further, the report suggested that a plywood barrier and shingles be replaced only in isolated areas. He admitted that repair techniques he

recommended in 1997 were not contained in the 1990 report. However, he also stated that some problems were not obvious to him then, because his inspection on that occasion was for only one hour. He testified that it is possible to find ice dams in eaves on a regular basis. In response to the suggestion that his 1990 report did not refer to a large problem with the roof, he responded, "I just reported on the condition of the roof."

¶ 41 With respect to insulation, he was not able to confirm that the deficiencies noted in 1997 were caused by conditions at the time of construction as opposed to by non-or faulty maintenance.

¶ 42 He was asked whether he read the Western General Contracting letter dated May 5, 1996 to the Board, and responded that his company decided what repairs were required by the condition of the decks that he observed. He did believe that he was told that work done before his consulting contract was awarded was limited by finances. King was also cross-examined in detail on photographs which indicated the state of various components of the project before, during, and after repair. For purposes of this judgment, I do not find it necessary to relay all of that portion of the cross-examination. In cross-examination King noted that the apparent lack of rot depicted in certain photographs was because the pictures could not show the beams that were revealed to be rotted in later interim construction reports. However, King did acknowledge that in some instances, for instance regarding the decks, that his firm's position was that there were deficiencies in the original design of the project.

¶ 43 He admitted that he did not have information to indicate the history of repairs done on the decks when he reached his opinion that all the decks needed to be replaced, but he based that opinion on a physical inspection. When asked whether there was any record of a systematic analysis of the decks, he replied, "None other than what's in the letter." That is, the letter dated March 23, 2000. He distinguished comments in that letter with respect to the stairs from that of the decks in that the stairs were questionable and therefore it was necessary to address that issue in his letter, in contrast to decks which were all leaking and rotten.

¶ 44 King maintained that every balcony that was pulled apart had rot. He noted also that on a prior project all beams had rot when the balcony was taken apart. When asked whether all the beams at Whispering Pines had rot, he could not answer, although earlier in testimony he stated that if a beam was rotten, it was taken out. He further noted that although Western Contracting might have worked on beams in some units in 1996, it did not remove the number of beams he recommended be removed in 1997.

¶ 45 It was put to him that if the decks in 1996 had been found by Holmes of Western Contracting to be structurally sound, then they were left untouched for that reason. His reply was that that contractor did not rebuild the decks, but had merely nailed plywood over the face of beams, which then left room for water to get behind. King was not particularly aware of when membranes were installed by Western Contracting, but noted that the PVC was just nailed to plywood and the corners left open despite that draping. Also, at places where metal flashing stood out from posts, it was open for water to get in. King maintained that one could not merely deal with such a corner, but in his view a contractor would have to pull a deck apart to see the back of a beam to determine if it was rotten. During the course of this portion of the cross-examination, it was put to him that the decision to pull decks apart was a customer decision based on whether it was warranted by cost. He replied that the customer wanted his firm to redo decks to last a long time.

¶ 46 With respect to whether it would have made sense for the Board to ask Holmes to repair these deficiencies before tearing a deck apart, his reply was, "That was not my job." When questioned as to whether the Board ought to have pursued Holmes on the basis of warranted work, his response was, "That's a question for the property management company."

¶ 47 It was pointed out in cross-examination that Bauer, in assessing the need for repairs, could have had recourse to Holmes' priority list and that, indeed, when one compares the two main priority lists, they were in agreement except for a few items. The question was why all the decks were replaced in 1999 given the common ground shown in those letters. King's response was that he believed that the new decks still leaked, plus there had been the thinnest of membranes applied by Western Contracting in 1996. For instance, those membranes were scraped when shovelled. Also, some beams were not replaced and therefore unquestioned. In the end, on this issue, King stated it was the Board that made the decision to replace all the deck beams.

¶ 48 King acknowledged that although some of the initial and interim reports tracking deck repairs identified rotten beams being replaced, many others did not. The latter reports just noted the replacement and not the condition of the original beams.

¶ 49 Mr. Belzil, counsel for the Defendants, also noted the contrast in the actual cost of replacing joists of $3,496.50 to that estimated in the reserve fund study of $15,000.00 to $20,000.00. Also, that the rot to the decks indicated in the actual repair costs was the deck perimeters only.

¶ 50 King was cross-examined on why all the staircases were replaced. He was not certain whether staircase replacements were included in the final repair costs for the decks. Again, with respect to numerous photographs and reports, it was pointed out that replacements were effected when the photographs and job reports did not clearly indicate that rot was found. This, in contrast to other portions of the job reports where replacements had been effected after rot was specifically identified.

¶ 51 With respect to roofing repairs, King acknowledged that some damage shown in photographs was typical of an ice dam scenario. He also acknowledged that the rotting portions were at the perimeters of the roof. It was suggested that some of the buildings had more roof damage than others. King responded that he did not think roof damage was isolated to one block of buildings. King maintained the issue of the roof was not a matter of if, but when, it would need to be re-shingled. He was unaware that the Board had received an estimate of $20,000.00 for roof replacement in 1994 or that it had a repair estimate of $850.00 in 1995.

¶ 52 King agreed that that the original window installation practices were outdated by the time of his report and that the only maintenance, other than restoration, that could be effected to that type of window unit would be to caulk outside and paint.

¶ 53 King was cross-examined on the board's decisions from 1994 to defer some repairs. That is, had problems such as the roofing problem been addressed on a timely basis, the overall damage would be less and the life of the roof would be extended. King was of the view that repairs to the roof would have given it an extra life of one year "tops" and that the wood on the decks would, in any event of such repairs, continue to rot. It was his view, that at a certain point repairs do not make sense.

¶ 54 It was pointed out in cross-examination that the cost/life data in King's November 15, 2000 report was ostensibly based on 1994 input figures. Yet the replacement cost of the roof was shown as $54,000.00, which was a 1997 cost. Also, despite that replacement, the remaining life of the roof shown in the table was only four years. Further, soffits and fascia were included in the study and they did not exist in 1994. In other portions of that table, for instance painting, King acknowledged a 1998 price. He nevertheless believed that he had probably used current prices in 2000 and adjusted those prices back to the 1994 date. He maintains that all of the "remaining life" numbers in the 2000 letter were contrasted back to the 1997 numbers, and indicated that longer life expectancies for these components were shown in 1997, and, indeed, in 1994, than in 2000. He did state that contractors encountered more rotting than

they had contemplated in the 1997 report, and therefore to that extent he utilized 2000 hindsight in this portion of the 2000 report.

¶ 55 Mr. Belzil noted that the study anticipated huge expenses from 1999 to 2000 as King started his assessment at 1994 and then set life spans at six years. This in turn results in a huge deficit in reserve funds and was the basis for King setting a minimum fund of $70,000.00 being maintained annually.

¶ 56 It was pointed out that the life expectancy of concrete walks and patios was ten years shorter in 2000 than it had been predicted in 1997. He could not account for that difference. He was asked whether, given the very large replacement cost for that item, that that would impact on his assessment of repairs and costs on a "reasonable and sufficient" basis. Further, that in calculating huge expenses from 1999 to 2000, King was giving many components a 6-year life span, such as the concrete walks, and that in doing so he created a huge drop in funds available from the reserve which in turn impacted his setting of minimum reserve funds. He acknowledged that these calculations as outlined would so affect the minimum reserve fund.

¶ 57 King was then challenged that if large sums for repairs were therefore to be moved to later years, such as 2010, that would lower the reserve fund requirement. He replied that it would lower the requirement, but not the ultimate amount of the fund. He did acknowledge that if large expenditures were spread out over time, it would not be necessary to maintain a large capital balance and annual contributions would also be reduced, but not by very much. He stated that reserve fund study had not addressed the issue of operating expenses or the relationship between capital investment and lower operating expenses. He was of the view that the operating expenses ought not to be much different than if there were a large capital investment, for example lawn maintenance would still be required.

¶ 58 In re-direct examination King explained that changing the expected life of such items as concrete walks would affect the curve of the "reasonable and sufficient" funds required, which in turn would reduce the total needed in the fund by a small amount. However, in his view, by the year 2014, the effect would be much the same. That is, the curve would still be going up as a result of deficiencies in the fund. With respect to stairs in particular, he stated that his employees saw the proper state of those stairs in 2000 and therefore the 1997 35-year projection went down as rot was observed. With respect to design problems, he stated that if components at design time were marginally acceptable, that would be recognized in a study by reducing the remaining life of the component. That is that the effective age would be reduced based on the lower quality of the design.

Douglas Bauer

¶ 59 Bauer was first involved with Whispering Pines as the general manager of Sunridge, the firm that managed the property firstly while it was owned by the receiver National Trust and then while it was owned by Danray. Bauer stopped working for Sunridge in March of 1994 and went to work for Wade Engineering. During the time he was at Sunridge he was not consulted regarding the proposed annual operating budget that was provided to purchasers of units from the numbered company and specifically with respect to repair and maintenance items.

¶ 60 He could not recall whether there were repairs effected or maintenance done on the decks during the time he was employed by Sunridge.

¶ 61 While employed by Wade Engineering he did an inspection in which he said he probably looked at decks, siding, the roof, and possibly the concrete. He would have walked the roof and done a visual inspection, looking for evidence of water infiltration in the furnace rooms. He mentioned that he saw

significant rotting upon taking core samples. He saw staining on the furnace room walls. He was responsible for some of the costing that appeared in the Wade Engineering reserve fund study for which he used figures based on his knowledge and ballpark numbers within the industry.

¶ 62 In cross-examination he admitted that Danray compared favourably with respect to its maintenance procedures in comparison to other landlords in Edmonton at the time. He could not recall details of his advice to the Board at a meeting on April 22, 1997. However, he did recall that he viewed some items of repairs as flowing from design problems. He could not recall whether, in the course of assisting with the 1997 study, he took into account any deck repairs that had been done before 1997.

¶ 63 It was his evidence that, although Western had worked on the decks, some things were not as good as they could have been. He did not recall whether he met with Western in Leduc or whether he was paid $1,800.00 in consulting for that period. He could not recall whether he had reviewed Western's specifications at that time and indicated they were fine. He did remember that he was at a long meeting and that the people present were argumentative. On redirect, he stated that he did not put in Western's work when he was preparing his fund study as his study was based on work that needed to be done after Western's involvement.

William Kotoluk

¶ 64 Mr. Kotoluk is a roof inspector who now owns his own company. He took over from another employee inspecting work done on the decks at Whispering Pines. It was his job to ensure once the decks were taken apart, rotten components were replaced according to specifications. He also took pictures of the decks during construction. He recalls he was asked to take photographs of the course of repairs on the first repaired deck, and after that did so randomly, as it was his view they were doing the same work on all of the decks. By the end of his photograph-taking, he was only taking photographs of the most severe damage.

¶ 65 In cross-examination he thought that a list of the rotten joists and where they were taken from ought to have been in the file. He was cross-examined with respect to seeming discrepancies between number of joists reported in construction reports as having been replaced versus those being charged for on invoices.

Gregory Holmes

¶ 66 Mr. Holmes is a renovation contractor who was approached in 1996 by the Whispering Pines property manager, Argon Construction, through its employee, Theresa. He had had prior experience with this type of coach home project on another site. Theresa requested that he advise the Board what repairs were needed in the short term and to priorize the repairs within budget constraints. He performed an inspection on all of the decks and all of the furnace rooms. It was his opinion at the time that all the decks within the complex needed repair although some units needed repairs more urgently. In inspecting the decks he noticed that at some point new plywood put had been down in an effort to bring back structural soundness. However, when he removed that new plywood he found areas on the decks where the plywood underneath was completely rotted away or there was water trapped under underlay. In repairing the decks he felt that the only reason overlay was put on was to cover underlying deteriorating plywood. With respect to stairs and stair treads, he noticed some had been repaired with smaller dimensional wood. It was his opinion that the rot on the stairs was going to be ongoing as they had not been maintained.

¶ 67 Specifications he prepared were based on specifications from another similar project, in turn

originally prepared by King as a consulting engineer.

¶ 68 Holmes testified that the Board knew of the significant construction problems, but had a very limited budget. In Holmes' opinion, everything was a priority for repair, but as a result of budgetary constraints the Board was advised to repair the most immediate damage first and do other repairs later as funds became available. In addition, he reused as much material as he could. He also would have preferred to apply a thicker membrane on the decks.

¶ 69 After his initial letter of May 5, 1996, Holmes repaired three sets of decks. Then, by February of 1997 he advised Theresa that he had observed other problems on site besides the decks. He had inspected the roofs and determined that replacement shingles had been replaced only for six to eight rows. Since coach homes such as these were notorious for ice damning, it was his view the repair was to a visible roof, but also would be an area most affected by such ice damning. There were places where there was no ventilation at all, and since the insulation was also insufficient, there was a source of heat with nothing to take it away. Further, when the roof was opened at certain places, insulation had deteriorated from ice damage. By letter dated February 2, 1997, Holmes provided a report regarding these observed deficiencies. The handwriting on the report contained a notation of repair costs as:

> ... shingles $50,000.00 soffits $11,000.00; gutters and down spouts $3,400.00; and chases $4,900.00.

In the end Holmes repaired a total of five decks; four pairs and one single. There had been plans for the remaining decks to be repaired on a priority basis until all were repaired. Holmes was at a Board Meeting, February 4, 1997, when his recommendations were discussed, but had no further contact with the Board or the project after that date.

¶ 70 On cross-examination Holmes admitted that if the overlay and plywood had not been applied to the decks, a person could fall through the deck. However, he also stated that this temporary solution did not address structural problems. It was his view that the design of the project and decks was fine as long as components were maintained.

¶ 71 With respect to repairs he effected, it was his testimony that he removed rotten lumber from those units and made sure that what was substituted was not rotted. It was his view that his repairs had extended the life of the surface of the decks, but that there would still be problems with structural soundness and within furnace rooms. He acknowledged he had ensured that beams at the front of the decks were in good condition when he left the site and that he had applied Duradeck to ensure water did not get between the beams and the plywood surface of the deck. It was his view that in effecting the repairs the owners were left with a superior product to that of the original construction. He was satisfied that the Duradeck he applied was sufficient as a membrane and that the beams within the decks he repaired would remain dry. He was never asked to come back and do warranty work and stopped operating his company in 2000 or 2001.

¶ 72 He confirmed his February 1997 quote indicated that the best long-term solution for the roof was replacement, as it was his view that the roof had lived its life expectancy. With respect to furnace rooms, his repairs were confined to the lower furnace rooms. He did no work within upper furnace rooms. He maintained that this was not necessarily because there was no water damage in those rooms, but because it was out of the scope of his work. Also, unlike the lower furnace rooms, the upper rooms were protected by the roof.

Joe Pound

¶ 73 Pound is now in his own business of performing building envelope evaluations. He worked with Wade Engineering for five years in the late 1990's. He evaluated the windows at Whispering Pines and also worked with Bauer evaluating the decks. His visual inspection of windows indicated that a fair number of windows were at the end of their effective life as the wood frames had sustained water damage and were rotting. Windows under overhang areas were not as deteriorated as those which were in areas exposed.

¶ 74 He testified that the Board made a decision to replace the windows. Initially, less than 50% of the units were replaced due to a lack of funds. In April of 1999, Bauer asked him to assist in reviewing the situation regarding the decks as the Board wanted to establish its funding priorities. At that time the remaining window units were weathered. Although some units were not in as bad condition as others, the Board decided to repair the remaining units to give the complex a uniform appearance.

¶ 75 In cross-examination, Pound confirmed that it was 32 end window units that were damaged from exposure. That, despite the fact that 106 windows were replaced. Pound confirmed that the first phase of the window replacement cost $46,545.00, and the second phase in 2001, cost $65,280.00. The cost difference was, in part, because the original installation practices were outdated and the replacement units were an upgrade. When asked whether he was aware that there had been work done on the decks by Western Contracting, he believed that that was discussed with Bauer as the work contemplated by King Engineering would upgrade the decks.

Gordon Smith

¶ 76 Mr. Smith is a chartered accountant and chartered business valuator practising in the City of Edmonton. He was retained to confirm the accuracy and reasonableness of the calculations which resulted in the preparation of King's reserve fund. He confirmed that King's assessment of the shortfall for the reserve of $441,565.00 was a calculation done in 1997 dollars. Taking that calculation back to 1994 and deducting the actual reserve that was set at $15,900.00, the shortfall becomes $405,298.00.

¶ 77 Mr. Smith also took a second approach to checking the reasonableness of King's calculations. This approach was only proffered as a check, and uses the actual capital expenditures from August 1, 1995 to September 4, 2003. By that method the funding deficiency was calculated to be $408,671.00.

¶ 78 Mr. Smith also calculated alternate scenarios involving a longer life for concrete stairs and calculated an inflation adjustment on the reserve fund. On the basis of that adjustment the $70,000.00 which in his opinion ought to be the minimum value of the reserve fund became $82,016.00 at 2002. If the value of the life of the concrete stairs was changed and then adjusted for inflation and interest, the fund deficiency becomes $355,328.00. It was Mr. Smith's conclusion that King's calculations were reasonable, including the value he used to calculate a present value for the fund.

¶ 79 On cross-examination Smith confirmed he made the key assumption that King's opinion of the appropriate and minimal annual contribution was correct. Also, that his conclusions are based on the assumption that King's opinion of the value of repair costs and the necessity for repairs and the life value of any component is correct. Finally, he had to accept King's opinion that there must be a minimum balance in the fund to form his own opinion. Accordingly, regarding those issues Smith was not forming his own independent opinion.

¶ 80 He acknowledged the sensitivity of the model of calculations in his scenarios as seen by the fact that changing the life of the concrete stairs results in the fund shortfall being reduced by $80,000.00.

¶ 81 Smith was cross-examined on King's method of calculating the fund to take into account expenditures that ought to have occurred in 1994, suggesting that the method was flawed as it was based on King's 2000 experience. Smith maintained that King's calculations are properly based on a 1994 analysis of what should have been done, and that indeed used 1997 costs, not 2000 costs.

¶ 82 Smith was cross-examined on the dependent versus independent variables that are contained in King's calculations. It was put to Mr. Smith that there were three independent variables in the analysis and that any change in one of those would result in a different annual replacement cost. Counsel for Danray, Mr. Belzil, put calculations in Exhibit 16 to Smith as an illustration of the premise and Smith acknowledged that to be the case. He did take issue with the presumption in that document regarding painting.

¶ 83 He was asked to concede the following: that although a reserve fund is established to provide for repairs and maintenance, not all the money within any such fund would be needed immediately; that this in turn impacted interest calculations on the fund. Also, that the year of an expenditure can affect the fund requirement. These premises were generally acknowledged. Smith also acknowledged that therefore the value of the initial contribution was extremely sensitive. He acknowledged that moving concrete stairs into 2017 would impact the reserve fund further, as would a change in the presumed interest rate and the presumed value of inflation. That with those values altered as suggested by Mr. Belzil, that his scenario 3 became $336,838.00 and were stairs to be presumed to be replaced in 2017, that figure would be further reduced.

Evidence of the Defendant

Diane Anderson

¶ 84 Anderson was a property manager employed by Sunridge Developments in the 1980's and 1990's. She first managed Whispering Pines for National Trust as owner and then for Danray after 1988. Bauer was her superior at Sunridge at that time.

¶ 85 She testified that Danray was a good client and that Taran had instructed Sunridge and her property manager to maintain the property in a prudent and efficient manner. During the time Danray was the owner, Taran came to Edmonton once or twice annually, would tour the property, and review Sunridge financial statements. He was also provided with monthly reports which he regularly discussed with her. She did not recall a problem with leaky roofs at Whispering Pines, nor any meeting she attended with Taran and King. She stated that if there were any problems with decks that Sunridge would have had them repaired. Indeed, there were some roofs replaced on other properties owned by Danray.

¶ 86 On cross-examination Anderson confirmed that final approval for non-budgeted repairs lay with Taran. Although in testimony, she had not recalled recurring problems with ice damning in the roofs, she acknowledged that in an examination on affidavit in October of 1997 she had stated that there were recurring problems each year with ice damning. She also confirmed that Sunridge was instructed not to replace perimeter decking.

Danny Taran

¶ 87 Taran was 72 years of age at trial and had been in the real estate business for many years. In 1988 he was approached by a Sarnia realtor with a proposal to purchase Whispering Pines from National Trust. National Trust wished a very quick response to its position. It was an appropriate investment for

Taran as he was looking to diminish recapture from another sale. He flew to Edmonton and went over the records of the project with Bauer and Anderson and decided to purchase the property within a very short period of time.

¶ 88 His theory of property management is that it makes sense to retain the management company already managing the property. He was extremely comfortable with Sunridge's management practices and reporting system, and indeed stayed with them until the last sale of his Edmonton units in 1998. There was no issue of establishing a reserve fund as he was buying a project to run as a rental, despite the fact it was registered by condominium title.

¶ 89 Taran came to Edmonton once or twice a year to meet with the site manager. It was important for him to know the problems and in turn keep the tenants happy. He instructed the management company to manage the property properly, to do any short term maintenance, and to prolong the life of his asset. He approved reasonable budgets, although it was his view that components ought not to be replaced if repairs could be effected.

¶ 90 He did not have any specific recollection of a note from Anderson regarding roof repairs. However, in reviewing the document it was clear to him that he made the decision not to spend $12,800.00 on roof repairs because he knew that he could spend $25,000.00 for a new roof. His decision at the time was to repair the damage and monitor the condition of the roof.

¶ 91 Taran stated he never saw King in his life and that it would be ludicrous that he would ask an engineer who makes a living preparing specifications to prepare specifications for nothing. Danray's 1992-1993 financial statements showed an exterior expense item of $26,271.00, which Taran stated included the sum of $15,000.00 for re-staining the entire project. Otherwise, the last year that Danray operated Whispering Pines the exterior maintenance expense was $16,017.00.

¶ 92 In the fall of 1993, Mr. Kornel from ReMax called to discuss a joint venture plan to convert the project into condominiums. Although he was not initially interested, they eventually did agree to a sale based on $65,000.00 per unit. The sale documents reflected simultaneous closings, as Taran could not give title to the ReMax group unless he could pay National Trust, and in turn could not do so without funds from the marketed condominium units. Taran at no time entered into individual contracts of sale of units and at no time marketed the units.

¶ 93 Taran testified that the sale documents required his purchasers, the realtors, to establish a reserve fund in order to market the units, and they accordingly chose the amount set. Taran had no interest in the fund value because if it had been greater than that set, he would merely have increased the sale price for the units.

¶ 94 Taran at no time prepared or provided an operating budget for a reserve fund for Whispering Pines. He acknowledged that there was correspondence from his lawyer to the purchaser's lawyer regarding deficiencies, which referred to a sum of approximately $15,000.00 to remedy deficiencies. However, he had no other information regarding the source or basis for the reserve fund budget. During the time between entering into and the closing of his sale he had no reason to review the reserve fund budget or its basis, as that was a matter of interest only to future buyers.

¶ 95 By June 29th he executed a management agreement. He signed a special resolution on behalf of Danray, which deleted the bylaws of the condominium corporation and replaced them with new bylaws. At that time Taran acknowledged he was the sole registered owner of all the units and that he was the sole director of the corporation. The registration of all these documents was effected July 12, 1994.

Taran stated that he executed these documents and they were registered because Danray was required to act for a very short period of time as the condominium corporation until the final closing of the sale in August 1994. According to Taran, that was the sole reason he acted as a director of the Board of the condominium project. During that period he had no reason to, and did not consider, the operating budget. There was some correspondence in the same period with respect to deficiencies in repairs and costs which Taran stated was an attempt by the purchaser to reduce the price. In the end, Taran had Anderson look at the deficiencies mentioned and he agreed to do a repair valued at $2,200.00 and the repairs were then effected by the realtor, Mr. Wolanski.

¶ 96 Taran was asked to comment on the cost/life data contained in King's report. It was his opinion from his experience in real estate that the data was flawed. He did however analyze the report using some of King's figures if he agreed with them. For instance, although he knew that a replacement cost for the roof in 1995 was $25,000.00, he used King's number. He removed costs for soffits as there were none in 1994, and stated ranch walls ought not to be included as such walls cannot be considered a capital item. He further noted that in the first meeting of the new Board of Directors of the Condominium Corporation, the property manager advised the Board that windows were the responsibility of individual owners and that the same applied to aluminum siding. He noted that there was only one case of a leaky window noted during the whole time that he was the owner of the property. With respect to painting, it had been stained in 1993 for $15,000.00 and in his view, painting should occur every five years.

¶ 97 With respect to balcony railings, he noted Western Contracting had repaired nine decks for $25,000.00, and if that sum was extended, all of the decks could be repaired for $70,000.00. This sum would include the provision of a membrane and stair repair. He left sums for fencing and asphalt. He noted that concrete walks do not wear out and he left this span as 25 years. He noted landscaping was a maintenance item and not a capital item. He could not account for why a contingency sum was inserted by King given the depth and detail of the study. By then increasing condo fees and applying interest at 2% per year he calculated a reserve fund at $742,295.00 which never went into the negative. On that basis Taran noted that that could be effected without any special assessments and questioned where the damage could be said to have been sustained here. Further, he was of the view that the majority of expenses were to upgrade the project.

¶ 98 In cross-examination, Taran confirmed that his sale price for the project was $3,317,000.00. He confirmed that Sunridge's budget was approved personally by him every year and Anderson needed his approval for any repair over $2,000.00. During the time that the property operated as a rental project, there was no Board of Directors and he made all of the maintenance and financial decisions.

¶ 99 It was put to him that in the sale Danray was selling the whole of a structure to the numbered company. He stated it was clear the realtors were going to sell the individual condominium units, and the only way his interest could be protected was that the structure itself had to be sold by him to an intermediate buyer. This was essential to the deal struck. He also had to confirm enough sales at a certain period of time for him to have the necessary money to pay the mortgage. He further kept six units as collateral for the same reason. Finally, he agreed that his lawyer had the unconditional contracts which were essential to the deal before the closing in August 1994. Thus by July of 1994 he was committed to the sale and had been made a director of the condo corporation as his lawyer had had the requisite amount of contracts in hand.

¶ 100 Taran acknowledged receipt of a letter from Wade Engineering Ltd. in September of 1990 which recommended that new decking and shingles be installed in certain areas at Whispering Pines for a cost of $12,800.00. He was not concerned when he received the letter because he realized that every winter some damage would occur to wood structures and in spring some work would therefore have to

be done to date. He described taking King's recommendation with a grain of salt firstly with respect to the estimate of cost and secondly because the recommendation did not take into account maintenance done. He acknowledged that it was his decision not to replace any perimeter decking, but felt that other recommended repairs were probably effected. It was his decision that he would seriously look at replacing roofs before he would do the costly repair recommended. Further, that King was, in recommending that costly repair, not dealing with all of the roofs and therefore he again would not spend $12,800.00 to repair a portion of the roofs when he had an estimate of $25,000.00 to replace all of the roofs.

¶ 101 Taran acknowledged that the offer to purchase that was made to him by Kornel and Wolanski on behalf of the numbered company provided that he was responsible to maintain the property and pay for all improvements required prior to closing as a prudent owner of similar property would, and that the clause specifically referred to the replacement of decks. In this case his information from Sunridge was that any defects observed were repaired., Taran acknowledged that, by letter dated July 15, 1994 from Sunridge under the authorship of Anderson, he was advised that there were evident deficiencies noted on the roof surfaces that required repair. Given that he had received that letter July 15th and closing was August 1st, he believed it was simpler for him to negotiate a reduction in the sale price with the purchasers. It is his position that at all times he was dealing with Kornel and Wolanski, who in turn accepted his offer of a reduction in their cash price as full settlement of this issue. He did acknowledge that at the time he was the sole director of the condominium corporation. When asked whether he considered the effect these deficiencies would have on individual purchasers he responded that he did not. Either he would do the repairs or Kornel and Wolanski would, and in this case it was more economical that they do the repairs. When questioned if he took steps to see whether the repairs were done he responded that he was there two months later, and if one has regard to photographs of roof deficiencies he questioned why individual purchasers bought in the face of such visible deficiencies.

¶ 102 He acknowledged receipt of a fax from Wolanski which referred to water pouring into one of the furnace rooms. His response was that he sent this correspondence to Anderson and relied on her to deal with it. She did note the stain was an old stain and she recommended he reduce the sale price by $1,750.00, which he did.

¶ 103 Taran was questioned with respect to the February 28, 1994 agreement with Wolanski and Kornel which referred to roof damage caused by spring thaw. He stated that since 1994 he could only find four leakages noted in documents produced. Although he acknowledged that in the past there had been damage to the roof and water in furnace rooms as a result of thaw, he stated that he had been running a rental project and therefore the leaks would be repaired to make sure there were no problems caused to the tenants. With respect to deficiencies noted by Wolanski and Kornel in their July correspondence Taran stated that they had performed two inspections by that time, the deficiencies were minor and he had no reason to, for instance, hire an engineer given closing was in two weeks.

¶ 104 Taran acknowledged that he knew the purpose of a reserve fund in a condominium project is to fund future repairs. When asked whether he knew that such a fund is not limited to providing for annual repairs, he stated that in his experience when a building has more residential owners than investors involved, the fees always skyrocket. He acknowledged that he knew that reserves are to provide for big ticket items, but also noted that in 1994 there was no obligation in law to do a reserve fund study. He acknowledged that his lawyer prepared new bylaws for the condominium corporation because it was his understanding that Wolanski and Kornel wished a new set of bylaws. Although he never read the bylaws, he acknowledged that they provided a Board obligation to estimate common expenses. Here, Wolanski and Kornel decided on a contribution of $300.00 per unit. When asked if he knew what they did to determine that was an appropriate contribution, he replied that he knew that at the first Board Meeting their property manager, Argon, presented a budget. He acknowledged that if a major repair was

required, the only funds that would be available would be the $300.00 per unit. Taran received the budget and signed the management agreement as a director. He had Anderson sign the estoppel certificates. He knew all these actions were to effect sales to individual purchasers and to effect his sale. He acknowledged he knew the only document regarding common costs that a purchaser would have was the budget.

¶ 105 Taran acknowledged that Danray's operating statements would contain indications of expenditures he had approved, but he did not keep operating records for more than five years and these were not provided to Argon.

¶ 106 In redirect Taran stated although he received and saw the budget, he never approved the sum of $15,900.00 that was set for the reserve fund for the corporation. Taran was involved in providing the estoppel certificate to individual owners, even though Diane Anderson actually signed them. The budget for the project set annual repair and maintenance at $4,700.00 which was contrasted in cross-examination to the $26,000.00 Mr. Taran had spent in the year prior to the sale. The monthly fees shown in the budget were $65.00 per month, when by Taran's own calculations, the condo fees by 1998 ought to have been $107,647.00.00, which is $100.00 more per unit.

Position of the Plaintiff

¶ 107 The Plaintiff submits that both Danray and Taran owned fiduciary duties to individual purchasers and to the condominium corporation, and that they breached their duties by participating in a program of cosmetic repairs which covered up rotten decks, damaged furnace rooms, and inadequate roofs. They allege further that they breached these duties by participating in the distribution of a grossly misleading budget.

¶ 108 The Plaintiff takes issue with Taran's position that this was just a commercial real estate deal. It contrasts Taran's actions here, to those where he sold other rental properties on block to other developers. In this case, units were marketed directly to the public and transferred directly to the public from Taran's company. The Plaintiff submits that the question of whether a fiduciary relationship arises turns on whether such an obligation would serve to enhance the integrity of the condominium and further the purposes of the Condominium Property Act: 2475813 Nova Scotia Ltd. v. Rodgers (2001),189 N.S.R. (2d) 363, 2001 NSCA 12. Further, that it has been widely accepted that a developer has certain fiduciary obligations to protect the interests of all unit owners, present and prospective, as well as the interests of the condominium corporation. On that basis the Plaintiff submits a developer cannot put his own interests in conflict with the interests of the condominium corporation, nor can he enrich himself at the expense of the corporation and the unit owners without their full knowledge and consent. 2475813 Nova Scotia Ltd. v. Rodgers; Condominium Plan No. 86-S-36901 v. Remai Construction 1981 Inc. [1992] 1 W.W.R. 66, 84 D.L.R. (4th) 6; York Condominium Corp. No. 167 et al v. Newrey Holdings Ltd. et al (1981), 32 O.R. (2d) 458, 122 D.L.R. (3d) 280 (Ont. C.A.); and Matthias v. Strata Plan VR. 2135, [2000] B.C.J. No. 592, 2000 BCSC 519 (B.C.S.C.); Hill v. Strata Plan NW 2477 (1991), 57 B.C.S.C. (2d) 263, 81 D.L.R. (4th) 720 (B.C.S.C.); Strata Plan 1229 v. Trivantor Investments International Ltd., [1995] B.C.J. No. 557; Strata Plan 1261 v. 360204 B.C. Ltd., [1995] B.C.J. No. 2761, 1995 CarswellBC 188, 4 B.C.L.R. (3d) 259 (B.C.S.C.).

¶ 109 The Plaintiff submits that in this case Taran had a stack of individual purchase contracts at his lawyer's office. He wished to protect his interest as a landlord and vendor and therefore made it a condition of the sale that he be provided a certain number of contracts. The Plaintiff submits it is the existence of these purchase agreements which put Taran in a serious conflict of interest. It argues that in this regard Taran is in a similar position to that which the courts found in The Owners: Condominium Plan No. 752-1207 v. Terrace Corporation (1983), 26 Alta. L.R. (2d) 147, 146 D.L.R. (3d) 324, 43 A.R.

386 (C.A.) and York Condominium Corporation No. 167 v. Newrey Holdings Ltd.

¶ 110 The Plaintiff submits that although Taran was formally appointed as the director of the condominium corporation in July of 1994, the evidence makes it clear that he personally exercised control over all the condominium corporation's activities since 1988. As such he was the condominium corporation's de facto director from that time and was responsible for the enforcement of the bylaws and the control and maintenance of common property: Strata Plan 1229 v. Trivantor Investments International Ltd.. The Plaintiff notes that the Court in that case found that any suggestion that the de facto director had no obligation to carry out the corporation's responsibilities is flawed. Counsel submits that Alberta has similar mandatory provisions in ss. 27, 20, and 23 of the Condominium Property Act to those considered in Trivantor. Further, it argues that these fiduciary duties apply to both Taran and Danray because of the close connection between the two and the fact that all steps were taken with the knowledge and complicity of both Taran and Danray. In that regard, the Plaintiff relies specifically on Condominium Plan v. Renai Construction and The Owners: Condominium Plan Number 752-1207 v. Terrace Corporation (Construction) Ltd.

¶ 111 The Plaintiff acknowledged that most of the reported cases which involve the abuse of individual's rights in a condominium setting are fact situations where a developer took advantage of its position to control the actions of the condominium corporation. The Plaintiff notes that the consumer protection provisions of the Condominium Property Act define "developer" as follows:

> 1(1) In this Act, - - -
>
> (h) "developer" means a person who, alone or in conjunction with other persons, sells or offers for sale to the public
>
> (i) residential units, or (ii) proposed residential units,
>
> that have not previously been sold to the public.

¶ 112 The Plaintiff submits that Taran and Danray were the developers within the meaning of the Act, as Danray did not sell the residential units to another developer and exit the scene prior to individual sales. Rather, Whispering Pines was sold to individuals concurrent with Danray's own closing of the purchase of the project. He remained intimately involved in the sale to the public and indeed his transaction with the realtors was conditional upon there being a sufficient number of individual purchase agreements in hand for his sale to proceed. The result of this arrangement was that title to the individual units transferred directly from Danray to the individual purchasers. In these circumstances the Plaintiff submits that Taran was indeed selling units to the public "in conjunction with" the realtors.

¶ 113 Further, the Plaintiff argues that even if Danray is not a developer pursuant to the statutory definition, that that does not limit it or Taran's obligations. The Plaintiff relies on the statement in 2475813 Nova Scotia Ltd. v. Rodgers, in which the Court noted that the average person would understand that no one, including the developer of a project can 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 is concerned. Thus, the Plaintiff submits that the fiduciary duty is owed regardless of whether the Defendants here are within the statutory definition of developer.

¶ 114 The Plaintiff further notes that in Trivantor a breach of fiduciary duty was found, even though

the Defendant was not an owner/developer within the meaning of the Act. The Plaintiff submits that in these circumstances it would undermine the consumer protection function of the Condominium Property Act, which includes the provision of estoppel certificates, if a developer was allowed to escape its obligations to the public simply by interposing a shell company. The provisions of the Act, the Plaintiff submits, must be interpreted in light of the reality in relationships between developers, purchasers and condominium corporations: Condominium Plan No. 86-S-36901 v. Remai Construction 1981 Inc.

¶ 115 The Plaintiff notes that in some cases developers have tried to escape their obligations by attributing decisions like Newrey to different provincial statutory regimes. The Plaintiff submits that this argument has failed as these decisions have turned on the application of fiduciary principles and the scheme of condominium legislation in general, rather than the specifics of any particular regime: Condominium Plan No. 86-S-36901 v. Remai Construction 1981 Inc.; Strata Plan 1261 v. 360204 B.C. Ltd.

¶ 116 The Plaintiff notes the Condominium Property Act requires the corporation maintain common property: ss. 26(1), 30(1), (2)(a); and that the bylaws are binding on the corporation and all owners as if signed and sealed. In this case, before enacting new bylaws on July 5, 1994 the bylaws were the statutory "default bylaws" which provided:

> 331 (1) The Board shall establish and maintain a fund called the Capital Replacement Reserve Fund to be used for the repair and replacement of
>
> (a) any real and personal property owned by the corporation, and
> (b) the common property when the repair or replacement does not occur annually.

¶ 117 The revised 1994 bylaws contained specific provisions requiring the establishment of a capital reserve and common expenses included:

> 86(d) All reserves for repair and replacements of common property and portions of units or buildings the repair or replacement of which is the responsibility of the corporation.
>
> 96(i) Reserves for future maintenance and expenses in the capital replacement reserve fund.

¶ 118 Here, the Plaintiff notes that despite having had control of the condominium project since 1988, that Danray failed to establish a capital replacement reserve fund as required by s. 33 of the bylaws which governed until 1994. This may have been expedient for him in his position of a landlord. However, the Plaintiff submits that when the units were marketed to the public Taran's previous failure to set a reserves fund should have been considered when the fund was established in 1994. The Plaintiff notes that a failure to set a reserve fund when the project is run as a rental property prior to sale as condominiums was criticized by the Court in Trivantor. Here, the Plaintiff notes the $300.00/per unit figure appears to have been picked out of the air and was set within the purchase agreement between Danray and the realtors before the realtors had even waived due diligence. Indeed, Taran was frank in his testimony that he did not care what sum was established as he was not contributing to the fund.

¶ 119 The Plaintiff further submits that the evidence indicates that rotten decks and leaking roofs had been an ongoing problem at Whispering Pines and this was well known to Taran. Rather than adopting

long-term solutions, Taran consistently chose cheap solutions with the sole objective of making the project look good for tenants, as, in his own words: "renters don't look in furnace rooms". The Plaintiff notes the evidence is that those rooms suffered the worst of the neglect.

¶ 120 The Plaintiff submits that when Taran bought Whispering Pines he had access to its maintenance records. Individual purchasers were not so lucky. The budget painted a rosy picture of low condominium fees and low expenses to maintain the property when clearly that was not what was required by the state of disrepair. The Plaintiff submits the distribution of the low ball budget to the ultimate purchasers constituted a decision which intimately affected the purchasers' everyday lives and security: Rodgers (supra).

¶ 121 Although Taran attempted to distance himself from the budget, the Plaintiff submits the evidence is clear that although Argon apparently generated it, it was approved by Taran as he received it from his lawyer along with the management agreement he ultimately signed. The Plaintiff submits that where a director of a condominium corporation has breached of trust obligations, the remedy is the restoration of the common property: The Owners: Condominium Plan Number 752-1207 v. Terrace Corporation (Construction) Ltd.. Further, these principles were applied by the British Columbia Court of Appeal in Strata Plan 1229 v. Trivantor Investments International Ltd. The Plaintiff submits that the damages calculated by King as reasonable and sufficient were modest in comparison to those that would be calculated on an equity replacement model. Indeed, Mr. Smith's evidence would indicate that far more capital works were undertaken than the amount claimed and that the damages claimed here really reflect the major repairs to 2000 required by prior disrepair.

¶ 122 The Plaintiff submits the claim is properly proved to be $336,838.00.

¶ 123 The Plaintiff notes that no expert evidence was led by the Defendant. Taran's opinions of repair costs for certain components as reflected in Exhibits 16 and 21 ought not to be entertained by the Court given his interest as a party.

¶ 124 With respect to the submission that problems were attributable to "design defects," the Plaintiff submits that no reduction in the damages should be made on this account. Any such defects were well known to Taran between the years 1988 and 1994 and ought to have been taken into consideration by him when the reserve fund was set in 1994. Again, the Plaintiff cites Trivantor. Further, it appears Taran fixed only those things necessary to keep tenants happy, while neglecting to repair key structural elements.

Position of the Defendants

¶ 125 The Defendants first note that the Amended Statement of Claim does not allege that Danray was "the developer." The Defendants' case, put simply, is that Danray owned a commercial property which it sold in its entirety to a numbered company and that the contract with that numbered company is the limit of Danray's obligations.

¶ 126 The Defendants note that Water's Edge Village Estates (Phase II) Ltd., Appellant and Her Majesty The Queen (Duncan v. R.), 2002 D.T.C. 7174, 2002 FCA 291,(leave to appeal refused 311 N.R. 198 (note), 2003 CarswellNat 707) sets out the principles of interpretation that apply here. They submit that the Condominium Property Act was not intended to apply to commercial properties. The consumer protection regime in the Act is triggered only when residential property is sold to the public. In that regard the definition of "developer" is "one who sells residential units to the public" and the disclosure obligations in the section only apply to a person who sells directly to the public. Counsel for the

Defendants note that the obligation to establish a reserve fund is found in the bylaws and is the Board's obligation, not the corporation itself. Therefore, as a matter of interpretation, until there is an obligation to establish a Board, there can be no obligation to establish a reserve fund. Moreover, counsel submits that the obligation to establish a reserve fund arises only where repairs or replacements do not occur annually. He submits that here, the evidence of Daly, Anderson, and Taran shows that when repairs were required they were undertaken. For instance, when roofs in the Danray portfolio of projects were required to be replaced, they were replaced.

¶ 127 The Defendants note that the fiduciary obligations that have evolved through the case law have only applied to developers. They submit that Trivantor does not apply: it is not Alberta law, is based upon a completely different and more prescriptive statute, and is factually distinct in that in Trivantor, the vendor/developer sold units directly to the public. Finally, the Defendants submit that Trivantor is incorrect in that it turns fiduciary obligations upside down.

¶ 128 The Defendants' main argument is that the rights of equitable purchasers, and therefore the duties of vendors under interim agreements, are "commensurate with the interest which under all the circumstances, equity would decree by way of specific performance of the agreement": Miller v. Howard, 1914 CarswellBC 143. 30 W.L.R. 112 (P.C.). The fact that Danray agreed to convey directly to the purchasers does not give them a greater right than the numbered company and the purchasers cannot stand in any better position than the numbered company on the issues of maintenance and reserve funds: see C.N.R. v. Peterson (1914), 29 W.L.R. 286 (Sask. S.C. en banc). Indeed, there was no greater fiduciary obligation on Danray or Danny Taran and any interference in the sales of the numbered company would have given rise to a right to claim specific performance and likely an injunction against interference, by that company.

¶ 129 The Defendants note the few condominium corporation acts done by Danray as only part of its sale obligations: Taran signed the management agreement which was accepted by the owners' Board, new bylaws were passed by Danray and not by Taran as a Board member, and the estoppel certificates were issued with Danray's authority.

¶ 130 The Defendants state that s. 23(3) gives condominium owners the power to set Board policy with respect to maintenance and there is no objective standard imposed by the Act. They submit that much of the evidence here concerned an alleged objective standard which they submit is irrelevant. Alternatively, they submit that the evidence shows that the owners' budget was prepared by Argon, was presented by Argon to the Board, and was accepted by the new owners. They submit that the roof problems of the complex have been grossly overstated. The deck and stair problems were repaired at grossly excessive cost. They note that Western General Contracting was using a measured approach which would have resulted in a total replacement cost of approximately $70,000.00 instead of $200,000.00. They further note that the Wade stair condition report shows a high percentage of acceptable stairs and that most decks survived 18 years which should be contrasted to King's evidence that new steps have a lifetime of only 20 to 25 years.

¶ 131 The Defendants note that in 1994 the windows of the complex were not considered to be common property. Indeed, that there is no evidence of what a reasonable board of managers would have done in 1994 regarding any of these repair items. They describe King's evidence as irrelevant to the issue of what an ordinary board of directors would have done about these matters in 1994 and characterize his "best practices" testimony as "a self-described technique". They cite Neuzen v. Korn, [1995] 3 S.C.R. 674, 188 N.R. 161, 64 B.C.A.C. 241 and Deyong v. Weeks 1983 CarswellAlta 43 25 Alta. L.R. (2d) 117, 43 A.R. 342 (C.A.) (leave to appeal refused (1985) 58 A.R. 38n) in this regard..

¶ 132 Finally, if the Court finds mismanagement on the part of Danray or Danny Taran then the

Defendants submit it must reach the same conclusion regarding the Plaintiff's own Board members as they: failed to replace the roof at $29,000.00; failed to undertake basic maintenance in terms of caulking and roof repairs; spent money unnecessarily and wastefully on the deck repairs; and replaced owners' windows even though the corporation was not responsible to do so. Analysis and Decision

¶ 133 The Defendants maintain that the Amended Statement of Claim does not allege Danray was a developer. However, if the evidence establishes such, I can and do amend the claim. Simply put, there is no surprise to the Defendant in such an amendment.

¶ 134 I accept that Taran and Danray may be considered a "developer" as defined in the Act, since they in conjunction with the realtors, sold or offered for sale to the public residential units, that had not previously been sold to the public. The sale to the realtors was, not coincidentally, directly tied to the sale of the individual units. The entire sales arrangement was for the purpose of selling individual units to the public, and the public protection intention of the Act should not be circumvented merely by inserting a intermediary in the process. If the individual units had not been sold to the public, the entire sale would have failed. Further, the public protection provisions of the Act are intended to ensure that a new condominium corporation and Board is protected from a developer who takes advantage of its position to control the actions of the condominium corporation before the first Board is established. This protection is just as relevant to this situation, where although the units are not new, the Board is.

¶ 135 In any event, I am of the view that this action is properly founded on the basis of breach of fiduciary obligations. Although Taran viewed this transaction as a commercial real estate transaction, the fact is that its structure resulted in his company approving the management agreement, being assignor on the estoppel certificates and, by way of conduit, approving the budget that was part of the eventual sales package provided to individual purchasers. On that basis, at a certain period in time Taran's company, Danray did occupy a fiduciary position in relation to the individual purchasers. In my view, that relationship was established by the provisions of the Act, and the original and amended bylaws. Therefore Danray had an obligation thereafter to properly maintain the property and to consider and appropriately set a reserve fund.

¶ 136 In that regard I reject the Defendants' contention that the contract with the numbered company was the limit of Danray's obligations.

¶ 137 In my view, the fiduciary obligation was clearly in place at the time Taran signed the management agreement and while he was a director of the condominium corporation. This would be a very short period of time from July 15th to August 1st, 1994. However, I agree with the submission of the Plaintiff that the time period in itself does not circumscribe the scope of the fiduciary obligation or its application to both Danray and Taran. Rather, in my view, the fiduciary obligation of Danray arose in January of 1994 when the purchase agreement was negotiated, and since that agreement clearly contemplated Danray having a role as a de facto Board from that time until the date of closing, Danray's fiduciary obligations arose at that time. I note that Stevenson J.A. in Condominium Plan Number 752-1207 v. Terrace Corp. substantially agreed with the comments of Wilson J.A., in York Condominiums at 467:

> ...I do not think the position of the owner-developer remains unchanged after he starts to sell units. I think that at that point he has committed the character of the project to that of condominium under the Act and declaration. I think he has also placed himself in a fiduciary relationship to the unit purchasers not only

> with respect to their units but also with respect to the interests appurtenant thereto. He therefore holds the property in trust for the unit purchasers, present and prospective, and for the condominium corporation which will come into being upon registration of the declaration. I believe he is under a duty to protect the interests of all unit owners, present and prospective, and cannot put his own interests in conflict with theirs even although he himself continues to be an owner as long as any units remain unsold.
>
> (Emphasis added)

¶ 138 The fiduciary obligations were defined by the Condominium Property Act and the Corporation's bylaws, both the initial "default" bylaws and the subsequent bylaws passed by Danray. By s. 33(1) of the Act Danray had a duty to establish and maintain a fund called a "Capital Replacement Reserve Fund" to be used for the repair and replacement of the common property when the repair or replacement did not occur annually. The Defendants submitted that repairs did occur annually at Whispering Pines and therefore there was no breach of this section. I do not agree. That ignores the second portion of the phrase "replacement", which certainly by the evidence did not occur annually. Therefore, prior to July 5th of 1994 the obligation of Danray was to establish and maintain a fund in accordance with that section. I further find the obligation after July of 1994 did not change dramatically. Danray continued to have an obligation to provide for capital reserve for common property including reserves for repair and replacement of items of common property.

¶ 139 It was not until July 5th of 1994 that Taran personally became involved as a director of the Board. On assuming that position he brought with him the particular and unique knowledge of the status of the condominium's state of repair and the absence of a reserve fund. I find that his fiduciary obligation personally arose at that time. It can be said that his fiduciary obligation was for a short period of time. However, as a director he became personally responsible for establishing and maintaining a proper reserve fund. On that basis I find that both Defendants, Danray and Taran, had fiduciary obligations for the period of time that preceded their obtaining their funds from the original sale and handing over management of the corporation to a successor Board made up of individual purchasers.

¶ 140 The principles that apply to their obligations must be interpreted in a manner which is consistent with the integrity of the socially valuable relationship upon which the condominium is based: 2475813 Nova Scotia Ltd. v. Rodgers.

¶ 141 Given I have found that both Danray and Taran had fiduciary obligations, I cannot accept Taran's position that this was merely a commercial real estate transaction, and that the setting of the reserve fund and the amount of the contribution from individual contracts was none of his business. Certainly, from the evidence, Taran was very frank that whatever amount of money was to be attributed to condominium fees, and thereby a reserve fund, would come from his purchasers, the realtors. Therefore, if $300.00 per unit was in some manner insufficient, he in turn would add any additional amount for the contribution to the overall sale price he received from the realtors. I note that this realistically reflects Taran's view of the transaction. However, the transaction was structured to involve Danray and Taran in the sales to the individual purchasers: Danray executed the management agreement and estoppel certificates and Taran became a director of the Condominium Corporation. Thus, despite Taran's view of the commercial reality, the vendor Danray was clothed with fiduciary obligation.

¶ 142 It is this evidence that establishes the conflict of interest Taran and Danray were in. Any

increased budget would result in either a higher unit price, jeopardizing the sales, or any deficit would have to be covered by Taran. Therefore, while the best interests of the condominium corporation would have been served by an adequate budget, Taran and Danrays's interests lay in keeping the budget low. Similarly, while acting as a de facto director, Taran was able to maximize his profit from renting the properties, by avoiding any major repairs and at the expense of the condominium corporation, a further conflict.

¶ 143 The question is whether the Defendants met their fiduciary obligation; it is correct that the only evidence regarding the scope of the obligation and of the breach was led by the Plaintiff's witnesses, King and Mr. Smith, in their evidence regarding what was appropriate in the interests of the condominium corporation and ultimately the individual buyers. The Defendant chose to not lead evidence on this issue and now argues that it is both inappropriate in law to apply the expert evidence to the layperson decisions, and that King's evidence is otherwise flawed.

¶ 144 The evidence established that the board of new purchasers very quickly encountered significant problems with rotting decks, leaking, and ice damning in spring. I accept the evidence of the two owners, Ms. Urch and Daly, that the Board members were unsophisticated and felt assisted by legal advice and by the recommendation that they hire King's firm to do a comprehensive reserve study report. I accept that they further relied on information from these advisors that another condominium project had encountered similar problems and had dealt with those problems in a similar manner. However, there is no explanation for how the Board's very real problems with some decks and the roof escalated into the scope of the reserve study and what can only be described as a recommendation of wholesale repairs to a building which each individual purchaser must have known was not a new building at the time of purchase.

¶ 145 I accept that King has expertise in the setting of reserve funds. However, on a practical basis it appears that King was providing the owners with an assessment of wholesale replacements of major components to what was clearly not a new building. Given the timing of his intervention and the fact that the Board thereafter effected such wholesale repairs, I do not accept his evidence that his assessment was an appropriate assessment of a reserve fund at 1994 or indeed at any period of time.

¶ 146 However, the evidence is clear that:

1. Both Taran and Anderson were aware of deficiencies in the decks, furnace rooms, and the roof.
2. Amounts had been expended by Danray to deal with these problems and indeed in the year prior to the sales to the individual purchasers exceeded the total budget for the condominium corporation for the period commencing August 1st of 1994.
3. The new Board was aware of substantial problems on the property once the new purchasers took over, including unsafe decks and significant problems with water coming from the roof and affecting various units.
4. Holmes' inspection confirmed that all of the decks needed to be replaced eventually given the extent of the water damage, and he also noticed that the roof had been only cosmetically repaired. He and others noticed substantial damage in furnace rooms.
5. King, and his employees Bauer and Pound, confirmed similar problems.

6. The Board eventually replaced decks and fixed the roof.

¶ 147 Holmes' report was prepared in 1996. I accept Daly's and Urch's evidence that the problems with water, decks and ice thawing were apparent from the time the new purchasers were in their units. Accordingly, I am of the view that the reserve fund ought, in 1994, to have anticipated wholesale deck and furnace room repairs, and roof repairs and replacement.

¶ 148 I do not accept that that reserve fund ought to have contemplated the wholesale replacement of such matters as windows and concrete steps. Indeed, I do not accept the evidence of King that those items had failed at the time of his report or his evidence of their lifespan, or their replacement costs. I must also state that if the reserve fund was set in 1994 at the amount testified to by King, that given the value of the condominium units themselves, that this project would never have been marketed to the public. Further, I take into account that each of these purchasers was aware of the age of the building and of their units and had an opportunity to assess individual states of disrepair and major states of disrepair.

¶ 149 I am left to consider the evidence of what repairs were required and to consider the actual expenditures. I am prepared to allow the sums of $59,742.39 for roofing and $23,885.66 for the furnace room repairs as appropriate values that ought to have been contemplated in the reserve fund. With respect to deck replacement, clearly some decks required major repairs. I acknowledge the position of the Plaintiff that work done by Western General Contracting was insufficient because of budgetary restraints, and therefore in some instances had to be redone, particularly as it related to insufficient membranes. I am also cognizant of the evidence of Holmes that eventually all decks had to be replaced and that was the plan when he began his work. However, I have difficulty with the proposition that the sum of $192,716.91, with or without deductions for previous work done by Western General Contracting, reflects work that should have been contemplated and included in setting a reserve fund for these new owners in the summer of 1994. I also have difficulty with the evidence of how the owners finally did determine that all of the repairs were necessary in the scale recommended by King. In this regard I agree with the submission of defence counsel that in effecting these types of repairs the owners achieved a markedly different property.

¶ 150 Indeed, I agree with the submission of defence counsel that the Plaintiff's case seeks to have the previous six-year owner, that is Taran, provide all of the comfort for the future when, from King's calculations, these same owners would not be providing for their own future. This, as also was pointed out by the defence, also skipped the issue of whether the Board itself, after September of 1994, sought to put off expensive decisions and perhaps could be charged with some mismanagement. In the end, I do agree with the defence that there is a flaw in King's assessment. That is, that for the vast majority of the years projected for the fund, a period which is beyond most of the current residents' lives, the fund is over-funded. Also, that liabilities in this case have been pulled into the balance sheet and annual maintenance amounts such as caulking and even painting have been recast as capital. The windows are of course the most glaring example of that, as through 1994 "spectacles" there was no need for a wholesale replacement of the units.

¶ 151 The evidence indicated that any cost projected over a longer period of time dropped Smith's calculations precipitously. In summary, there was a fiduciary duty and some damages as a result of the conflict of interest occasioned when Taran and his corporation accepted an inadequate budget, knowing of pressing needs for capital expenditures. However, there is no appropriate basis in the Plaintiff's evidence, through King and Smith, to establish the claimed damages of $355,000.00.

¶ 152 I am left with the need to assess damages without a method found in the evidence. However, I

do not accept the defence proposition that as a result the damages are nominal; that the Condominium Corporation can always mitigate its loss by getting the owners to pay. I have found that there was a fiduciary duty, and that these Defendants were obliged to set the budget to cover future capital expenditures. However, the claim is for an additional $8,000.00 per unit. I consider Taran's evidence that an initial sum of $70,000.00 as opposed to the $15,900.00 ought to have sufficed. In the end, I also have regard to the actual expenditures on what I have found to be necessary repairs to the roof and the furnace rooms, and some portion of the decks.

¶ 153 The defence chose not to lead its own expert evidence. I have some regard to Taran's testimony that the replacement costs in 1994 were substantially less than those testified to by King. That, on his calculations, an additional $5,000.00 to the $15,900.00 ought to have been made available given that replacement started in 1999 and continued to 2002. However, this evidence also is suspect. I am left with actual expenditures, the extent of the fiduciary duty, and a difference in what perhaps could have been spent back in 1995 to perhaps 1999 to that which was expended in other years. I find that at least the cost of the roof and furnace room repairs ought to have been considered in the original budget passed on to the first Board of the condominium corporation with an additional sum for deck repairs. As a result, I award the sum of $180,000.00 in damages jointly and severally against the Defendants, noting that both Defendants are liable for the same damages, even though their breaches arose at different times.

¶ 154 Mr. Belzil, on behalf of the Defendant, submitted that the subsequent duty of the named Third Parties was no different than that of the Defendant in terms of the duty to set an appropriate fee contribution that would allow for these repairs. I see in this case a distinction between Danray and Taran as previous owners with particular knowledge, and these individual owners who were unaware of the problems when they bought the units. I decline to award anything with respect to the third party notices.

¶ 155 I am prepared to hear further submissions with respect to costs should the parties wish.

SULYMA J.

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