Case Name:

Kelly v. Reardon

Between
Bill Kelly and Florence Kelly, plaintiffs, and
Gary Reardon, first defendant, and
Reardon Construction and Development Ltd., second defendant

[2004] N.J. No. 30
No. 0103C00764

Newfoundland and Labrador Provincial Court
(Small Claims Division)
Hyslop Prov. Ct. J.

Heard: February 3, 2004.
Judgment: February 4, 2004
(23 paras.)

Counsel:

Bill Kelly, for the plaintiffs.
Gary Reardon on his own behalf and for the second defendant.

¶ 1 **HYSLOP PROV. CT. J.**:— The plaintiffs own a condominium in the premises known as The Imperial Condominium. The complex was formerly an old tobacco company built around the turn of the last century and after the Great Fire of 1892. It required a great deal of rehabilitation and construction in order to be converted to its present glory.

¶ 2 The first defendant controls the corporation that conceived, developed, marketed, and sold the sixteen condominium units contained in the complex (the second defendant). At the hearing of this matter I dismissed the action against the first defendant since it was evident that he at no time acted in his personal capacity, but rather acted through the limited liability corporation styled as the second defendant hereinafter referred to as "the defendant."

¶ 3 This is a sad story. The rehabilitation of the premises began around 1996 and the first occupants began moving in the following year. At some point early on, some of the occupants noticed a "dip" around the stairwell near Unit 104. This unit changed hands and ultimately came into the possession of Rick Follett. During his occupancy, the dip became worse and his living room floor began to change shape. Initially, everyone thought that this was associated with the "settling" of an old building and they thought that only cosmetic repairs were involved. Sadly, this was not to be the case. Once a proper assessment was done of the floor in Unit 104, it was determined that the old and (formerly) huge floor joists were completely rotted away with what appeared to have been longstanding dry rot. A major repair job was undertaken by the Condominium Board of Directors at the not inconsiderable cost of approximately $40,000.00. Of course, this burden was shared among the owners of the sixteen units.

¶ 4 The plaintiffs hold Unit 301. That particular unit was not damaged in any way by dry rot. It appears that the damage and repairs were largely confined to Unit 104 situate on the northeast side of the complex. The plaintiffs sue for the recovery of their share of the repair bill, $2,315.64. They allege that the defendant was negligent in the

construction of the complex. To support this contention they called Ivan Hynes, a Professional Engineer who testified that in his opinion, the contractor should have noticed the floor differential and done a further investigation to determine which floor element was no longer performing its proper function.

¶ 5 This whole process has been a difficult one. The Directors of the Imperial Condominium Corporation were faced with a very serious problem. Immediate and substantial repair work had to be done and in my view, the Directors discharged their obligations to their unit owners in a sensible, professional, and diligent way, notwithstanding subsequent recriminations from some people about the costs incurred and some of the choices that were made. For what it is worth, it is my view that the unit owners were well served by their Board of Directors in the circumstances.

¶ 6 The Condominium Corporation sought legal advice, and ultimately voted not to commence any legal action against the developer or anyone else for the cost of these repairs.

¶ 7 The defendant corporation takes the position that the plaintiffs have no right to sue individually. It cites the provisions of the Condominium Act, R.S.N.L. 1990 c. C-29 and alleges that the floor joists in question form "common elements".

¶ 8 The sole question to be decided in this ruling is whether the plaintiffs have the right to sue in these circumstances. The objection was made by the defendant at the commencement of the trial, but I could not decide whether "common elements" were involved without evidence to that effect.

¶ 9 At the close of the plaintiffs' case, the defendant repeated its objection and I heard both parties on this issue and reserved for a ruling. This is my ruling on the issue which was raised.

¶ 10 The law related to condominiums is a hybrid of the traditional "freehold" and a tenancy in common. The unit holder holds certain parts of the property as a freehold and holds common property as a tenant in common with all the other unit holders. This type of residence has become popular, especially for busy professionals and "empty nesters." In this province and others, the condominium owners and developers are subject to and protected by legislation.

¶ 11 The relevant legislation supra in s. 2(c) defines "common elements" as "the whole property with the exception of the units". As a matter of law, based on the facts adduced by the plaintiffs and the testimony of Suzanne Ottenheimer, I conclude that the floor joists were "common elements" or common property as alleged by the defendant. Bearing this out is the fact that the cost of repairs was borne by all the property owners including the plaintiffs (and the defendant corporation, which holds four units).

¶ 12 There is no magic in this conclusion. This simply means that the plaintiffs hold this property in common with all the other property owners who are members of the corporation which directs the day to day operation, maintenance and repair of the complex pursuant to the Condominium Act.

¶ 13 What effect does this tenancy in common have on this action? It should be remembered that the condominium corporation is tasked with responsibilities by virtue of the legislation. The assets of the corporation are "common" and it is responsible for maintenance, repair, and renewal of the common elements and is given by the legislation all the ancillary powers necessary to achieve that goal.

¶ 14 Subsection 12(6) of the Condominium Act reads as follows:

> "An action with respect to, arising from, or relating to a common element shall be brought by or against the corporation in its own name, and a judgment against the corporation is also a judgment against the owner of a unit at the time when the action against the corporation was raised for a portion of the judgment debt corresponding to the proportion which is specified in the

declaration as the percentage which that common element relates to the unit." (Emphasis mine)

¶ 15 The plaintiff argued passionately that this is an "access to justice" issue and that this subsection does not specifically preclude him from striking out on his own to seek redress. Regrettably, after due consideration I find that I cannot agree with him. The common nature of the property involved here would mean that even if he were to succeed in his allegations, I could not award judgment in his favour. All monies or funds relating to a common element would not accrue to him (or them) personally but to all the tenants in common. Mr. Kelly described himself quite correctly as a "shareholder". He is something akin to that. He is not suing for damage which was occasioned to his unit, but for the recovery of his share of the costs associated with the repair of common property. Only the corporation has that right. It has decided not to sue, and the plaintiffs are limited to taking action against their condominium corporation should there be grounds to allege some impropriety in the vote which was taken related to this incident, or some other breach of fiduciary duty.

¶ 16 The defendant argued that the legislation was crafted to protect the "common good" of the unit holders. This is a correct legal position. The text Condominium Law and Administration (Vol. 2) 2nd ed. Thomson Carswell, by Professor Audrey M. Loeb deals succinctly with this issue at p. 22-7:

> "Since damage to common elements affects all unit owners, the courts have held that the condominium corporation is the appropriate plaintiff. (Individual owners could, of course, sue for damages for their own units.)"

¶ 17 The leading case is Loader et al. v. Rose Park Wellesley Investments Ltd. et al. (1980) 114 D.L.R. (3d) 105 (Ont. H.C.J.). This case was argued under the provisions of the Ontario legislation. At that time s. 9(18) read as follows:

> "S. 9 (18) Any action with respect to the common elements may be brought by the corporation and a judgment for the payment of money in favour of the corporation in such an action is an asset of the corporation."

¶ 18 In my view, the Ontario legislation is a close parallel to the current legislation in this province. Note the use of the word "may" in this legislation , as opposed to the stronger, "shall" in the legislation applicable today in this jurisdiction.

¶ 19 In interpreting the weaker Ontario legislation, Justice Gray had this to say at p. 114:

> "I am of the opinion that s. 9(18) of the Condominium Act, which permits the condominium corporation to bring an action in respect of the common elements precludes the right of unit holders to bring a class action for themselves and all other unit holders in respect to the common elements. It is clear that the Condominium Act sets up a statutory scheme by which the fruits of any litigation in respect of the common elements will be equitably distributed amongst all the unit owners. Furthermore, the condominium corporation is created to represent the best interests of the unit owners and since it is a creature created to represent their interests and is controlled by them, it seems to me that it is the only proper party to bring such an action."

¶ 20 I apply this reasoning to the case at bar. The legislation in this province allows only a condominium corporation to take action in the circumstances alleged by the plaintiffs herein. The use of the word "shall" in the context of the statutory scheme not only permits such an action by the corporation, but restricts it to the corporation in a "common element" situation such as this.

¶ 21 Of course, notwithstanding whatever sympathy I may have for the plight of the dissident unit owners, I cannot sustain an individual action in these circumstances. This is not a "access to justice" issue. This court, (not unlike the unit owners) is bound by the Legislature and must apply the law in accordance with the applicable statute.

¶ 22 The action launched by the plaintiffs is dismissed on the basis that they have no standing to sue the defendant in relation to common elements outside the structure of the condominium corporation. Therefore I cannot deal with the case on its merits. There will be no order as to costs.

¶ 23 Action dismissed.

QL UPDATE: 20040205
qp/e/nc/qw/qltlc