Case Name:

Lightner v. Condominium Plan No. 772 3097

Between
David Lightner, Plaintiff, and
The Owners: Condominium Plan No. 772 3097, Defendant

[2009] A.J. No. 9

2009 ABQB 3

Docket: 0503 08029

Registry: Edmonton

Alberta Court of Queen's Bench
Judicial District of Edmonton

K.D. Yamauchi J.

Heard: December 9-10, 2008.
Judgment: January 5, 2009.
Released: January 6, 2009.

(43 paras.)

Counsel:

David W. Wolanski: for the Plaintiff.

Roberto Noce, Q.C.: for the Defendant.

Reasons for Judgment

K.D. YAMAUCHI J.:--

Introduction

1 This case involves the entitlement of an owner of a **condominium** unit to assign a parking stall to a subsequent purchaser. When addressing this issue, this Court must examine certain provisions of *The **Condominium** Property Act*, R.S.A. 1970, c. C-62, the legislation that governs in these proceedings (the "*Act*"), and the effect of certain estoppel certificates that the Defendant issued to the Plaintiff.

Facts

2 On January 30, 1978, the Defendant entered into an agreement (the "1978 Agreement") with Batoni-Bowlen Enterprises Ltd. (the "Builder"), the builder of a **condominium** complex known as Westwind Estates in Edmonton, Alberta (the "**Condominium**"). Pursuant to the 1978 Agreement, the Builder leased from the Defendant for a term of 101 years certain portions of the common property which the Defendant designated for use as parking stalls (the "Stalls"). As consideration for the Lease, the Builder transferred title to a unit of the **Condominium** to the Defendant for its use as a caretaker's unit. It was a term of the 1978 Agreement that the Builder could further assign the Stalls' leases to subsequent purchasers of the **Condominium** units.

3 The Defendant rents the caretaker's unit to the **Condominium's** caretaker at a reduced rental rate. The owners of units in the **Condominium** get the benefit of having a caretaker on-site.

4 No one raised any issue concerning the 1978 Agreement until 1993, when the Defendant's board of directors (the "Board") discussed the issue of the Stalls at its meeting. One of the Board's members wanted these Stalls for storage. The minutes of that meeting stated that the Stalls are part of the **Condominium's** common property. The Board recommended that a formal notice be given to alleged owners of the Stalls advising of the Defendant's intent to claim those Stalls unless the alleged owners could produce a valid agreement showing their entitlement to the Stalls.

5 Roger Lufkin, a former Board member, testified that the Defendant complied with the 1978 Agreement for over 14 years before another resident, Bob Christie, raised an issue concerning it at which time the Board commissioned an opinion from Defendant's counsel, Duncan & Craig (the "D&C Opinion"). On March 22, 1994, the Board received the D&C Opinion which stated the following:

> In 1978 by the **Condominium** Property Amendment Act, S.A., c. C-9, Section 21, the **Condominium** Property Act, R.S.A., 1970, c. C-62 as amended was further amended to add to the **Condominium** Property Act the following provision:
>
> > 25.1 Notwithstanding Section 25, a corporation may, if its by-laws permit it to do so, grant a lease to an owner of a residential unit permitting that owner to exercise exclusive possession in respect of an area or areas of the common property [emphasis added].
>
> By-law 6(d) of your By-laws reads as follows:
>
> > 6. The Corporation may . . .
> >
> > (d) grant a lease to an owner under section 25.1 of the Act.
>
> However, there is a limitation imposed on this ability by Sub-Section 6(2) of the **Condominium** Property Act, which reads as follows:
>
> > 6(2) If a plan presented for registration as a **condominium** plan includes residential units, that plan shall . . . delineate to the satisfaction of the Registrar the boundaries of the areas that are or may be leased under section 41 to an owner of a residential unit.
>
> We would briefly explain that the present revision of the **Condominium** Property Act in 1980 changed the Section numbers from 25 and 25.1 to Section 41.
>
> You will note that there are two important stipulations that must be complied with in order to have an exclusive lease of an otherwise common area property:
>
> (a) it can only be made to an owner; and
> (b) the common property to be exclusively leased must be sufficiently delineated on the **Condominium** Plan as filed with the Registrar of Land Titles to make it easily ascertainable as being an area of exclusive lease from other common property in the complex.

6 Because the **condominium** plan that the Builder filed with the Registrar of Land Titles did not delineate the Stalls, the D&C Opinion suggested that the leases that flowed from the 1978 Agreement were invalid. The D&C Opinion further suggested that the Defendant could apply to the court for termination of the leases, but such an application

would invite lawsuits as most of the present owners obtained the assignment of the leases for valid consideration. Thus, the D&C Opinion recommended that the Defendant advise the present lessees of the Corporation's position and that the Defendant would not consent to a further assignment of the leases. Neither the Plaintiff nor his lawyer had seen the D&C Opinion until sometime in 2004.

7 Peter and Carol Rodd (the "Rodds"), were subsequent assignees of one of the Stalls, being parking stall A referred to in the 1978 Agreement (the "Impugned Stall"), through a number of assignments since 1978. The Rodds listed their unit for sale in the spring of 1994. The unit is legally described as:

> **Condominium** Plan 772 3097
> Unit 11
> and 137 undivided one ten thousandth shares in the common
> property
> excepting thereout all mines and minerals
>
> (the "Unit")

8 The Plaintiff was seeking to purchase a **condominium** unit in the early part of 1995. While looking for a place to buy, he read a "Listing Highlight Sheet" of the Unit. This sheet had in bold letters "TWO extra parking stalls." The Plaintiff viewed the Unit and the **Condominium** with his realtor and was satisfied with the Unit. The Plaintiff and the Rodds entered into a purchase agreement on January 23, 1995 (the "Purchase Agreement"). The Purchase Agreement specified that the Plaintiff purchased an underground parking stall and the Impugned Stall. The Plaintiff did not separate the purchase price among the various segments he was purchasing, *viz.*, the Unit, the underground parking stall and the Impugned Stall.

9 The Plaintiff discussed the sale with his realtor and his lawyer. The Plaintiff had no contact with the Rodds, a representative of the Defendant or the **Condominium's** property manager (the "Property Manager"). The Plaintiff was never notified about the Board's position concerning the Impugned Stall until after he signed the Purchase Agreement and January 31, 1995, the date for his waiver of conditions, had passed. However, he was aware that there might be an issue concerning the Impugned Stall before he waived the conditions. His lawyer had received the 1978 Agreement, but received nothing else. The Plaintiff knew there was a risk concerning the Impugned Stall, but decided to proceed with his purchase despite the risk.

10 Ms. Rodd wrote a letter to the Board dated December 4, 1994. The Rodds were aware of the issues concerning the Impugned Stall and wanted clarification of the Board's position. She wanted their situation "grandfathered" to "allow us to transfer the lease to the new buyer." In particular, she was concerned that not to allow the Rodds to transfer the Impugned Stall to their buyer would "cause us untoward aggravation and possibly jeopardize a potential sale." In her letter, she advised that the Rodds "would ensure the next owners are aware of the finite time of their parking agreement at the onset to avoid unpleasant surprises later on."

11 The Board responded to this letter. The Plaintiff's lawyer, Merlin Mittelstadt, received a letter dated January 30, 1995, from the Property Manager saying that the Board provided the Rodds "a relaxation of the prohibition on further assignment to the purchaser of the Rodds unit." The Plaintiff interpreted this statement to mean that he could assign the Impugned Stall to any subsequent purchaser from him.

12 On February 16, 1995, the Plaintiff and the Rodds executed an assignment of lease in which the Rodds assigned their interest in the Impugned Stall to the Plaintiff. Neither the Defendant, the Board nor the Builder acknowledged or signed this document. The transfer of land with respect to the Unit was registered on March 10, 1995, and the Plaintiff took possession around the same time.

13 Sometime after the Plaintiff closed his transaction with the Rodds, he received an Estoppel Certificate ("1995 Estoppel Certificate") from the Defendant stating that "the right to exclusive use will terminate at the time of subsequent sale of [the Unit] by [the Plaintiff]." In other words, the Defendant would no longer consent or allow the Plaintiff to further assign the Impugned Stall and the Impugned Stall would revert back to the Defendant when the Plaintiff sold his unit. The Plaintiff interpreted this to mean that the Board would no longer challenge his absolute right to the Impugned Stall. Despite this, during the summer of 1995, the Plaintiff advised the Property Manager that he saw no basis for the Defendant's position. Subsequently, neither the Board nor Property Manager provided the Plaintiff any clear explanation for the Defendant's position.

14 In 1997, when the Plaintiff was seeking to refinance the Unit, the Defendant issued the Plaintiff another Estoppel Certificate ("1997 Estoppel Certificate"), that contained no prohibition restricting him from assigning the Impugned Stall to a subsequent purchaser. As a result, the Plaintiff considered the matter over. However, the Plaintiff received a letter dated September 24, 2003, from the Property Manager which again, raised the issue of the Impugned Stall. The Plaintiff invited the Board to commence legal proceedings to resolve this matter. As the Board did not commence any such proceedings, the Plaintiff filed a statement of claim on May 9, 2005, which commenced the action with which this Court is dealing.

15 The Plaintiff's position is that he originally paid an increased value for the Unit because of the inclusion of the Impugned Stall in his purchase price and there is an unfairness now to deny him the right to assign the Impugned Stall to his purchaser. In its letter to the Plaintiff dated July 7, 2004, the Property Manager acknowledged the vagueness of the relaxation contained in the January 30, 1995 letter to Ms. Rodd, when it said that "the ambiguity on the letter ... is again unfortunate." This letter makes no reference to the 1997 Estoppel Certificate.

16 Board members differed on their views of how the owners of the Stalls should be treated. Some of the owners voluntarily returned their Stalls to the Defendant. For the ones who did not, some Board members felt the owners should be entitled to retain their Stalls, as they had leased them for some time without the Board disturbing their "ownership." To disturb this would not be fair and the Defendant would gain very little from this, other than court costs. Other Board members felt that the Board's position has not changed since it received the D&C Opinion. Eventually, the Defendant wants all the Stalls, including the Impugned Stall, back in the Defendant's name.

17 Because of the D&C Opinion, the Board chose to negotiate a return of the Stalls from those who leased them. This seemed more cost-effective, as to do otherwise might result in litigation. In other words, certain Board members felt that the leases were void, but felt it would be more cost-effective, and less contentious, for the Board to negotiate with the lessees to have the Stalls returned rather than to have the courts enforce the Defendant's right to have the Stalls returned to the Defendant.

Issues

18 There are numerous issues that arise from these facts. They are:

(a) Whether the 1978 Agreement is *ultra vires* inasmuch as the Builder prepared it in contravention of the *Act*.
(b) If the 1978 Agreement is *ultra vires*, whether this Court may nevertheless determine that it is enforceable.
(c) Whether the 1997 Estoppel Certificate estops the Defendant from raising the facts as set forth in the 1995 Estoppel Certificate.
(d) Whether the Plaintiff's action is statute-barred pursuant to the *Limitations Act*, R.S.A. 2000, c. L-12.
(e) Who is entitled to costs of this action?

Analysis

19 The key issue with which this Court must deal is whether the 1978 Agreement is *ultra vires*. If this Court determines that the 1978 Agreement is *ultra vires*, all the remaining issues are moot.

20 The Defendant relies heavily on ***Condominium Plan No. 992 5205 v. Carrington Developments Ltd.***, 2004 ABCA 243, 354 A.R. 371, 329 W.A.C. 371, 34 Alta. L.R. (4th) 238 ("***Carrington***"). The facts of ***Carrington*** are similar to the facts with which this Court is dealing. In that case, the developer of a **condominium** project, while it controlled the **condominium** corporation, obtained from the **condominium** corporation the exclusive right to use a portion of common property, *viz.*, parking stalls, for a period of 101 years. The developer then attempted to sell portions of the exclusive use area to new owners so the owners could park their vehicles. The court struck down the exclusive use agreement. It concluded at para. 12, that the lengthy term of the exclusive use agreement made it tantamount to a lease and the developer had not complied with the statutory requirements to lease common property as set forth in the ***Condominium*** *Property Act*, R.S.A. 1980, c. C-22 ("1980 Act"). Thus, the court held that the leases of the common property were *ultra vires*.

21 Similarly, the Defendant argues that the 1978 Agreement is *ultra vires*. The Builder chose not to designate the Stalls, including the Impugned Stall, as common property areas reserved for exclusive use. As well, the Stalls were not

sufficiently delineated on the **condominium** plan the Builder filed with the Registrar of Land Titles. In ***Carrington*** at para. 9, the court said:

> A **condominium** corporation owes its existence to the Act and can only exercise the powers granted therein. Unlike a business corporation which enjoys the natural person powers provided by Alberta's Business Corporations Act, R.S.A. 2000, c. B-9, s. 16(1), a **condominium** corporation operates only within the powers granted by the Act: Francis v. **Condominium** Plan No. 8222909, [2003] 11 W.W.R. 469, 2003 ABCA 234 (Alta. C.A.).

Thus, Builder, as the **condominium** corporation at the time in question, must comply with the 1980 Act to exercise its powers.

22 As in ***Carrington***, the Builder did not register the Stalls, including the Impugned Stall, with separate titles. The court in ***Carrington*** at para. 11, held that because of this, the developer could not "transfer" the parking stalls to the new owners. The court concluded that the exclusive use agreement in that case was a lease and the lease "is ineffective as the developer did not comply with" the 1980 Act.

23 In ***Carrington***, the developer argued that the exclusive use agreement was authorized by section 41 of the 1980 Act, which provided:

> Notwithstanding section 40, a corporation may, if its by-laws permit it to do so, grant a lease to an owner of a residential unit permitting that owner to exercise exclusive possession in respect of an area or areas of the common property.

With the exception of its reference to a different section number, section 41 of the 1980 Act is the same as section 25.1 of the *Act* and section 40 of the 1980 Act is substantially similar to section 25 of the *Act*.

24 In the case with which we are dealing, by-law 6(d) of the **Condominium's** by-laws provides:

> 6. The Corporation may
>
> . . .
>
> (d) grant a lease to an owner under section 25.1 of the Act.

The court in ***Carrington***, however, held that section 41 is subject to section 6(2) of the 1980 Act, which provided:

> If a plan presented for registration as a **condominium** plan includes residential units, that plan shall, in addition to meeting the requirements of subsection (1), delineate to the satisfaction of the Registrar the boundaries of the areas that are or may be leased under section 41 to an owner of a residential unit.

After so finding, the court said:

> We find that s. 6(2) is determinative. Section 41 cannot permit the Exclusive Use Agreement as the **condominium** plan did not contain delineated boundaries: a prerequisite of s. 6(2). In a residential **condominium,** the boundaries must be delineated before the common property is leased. Carrington chose not to delineate the boundaries; as a result, it cannot lease the common property.
>
> ...
>
> We find that ss. 40 and 41 do not authorize the Exclusive Use Agreement. A **condominium** corporation cannot exceed the authorization granted in the Act. Therefore, the Exclusive Use Agreement and the resulting Purchase Agreements are ultra vires.

With the exception of its reference to a different section number, section 6(2) of the 1980 Act is the same as section 7(2) of the *Act*.

25 ***Carrington*** is, indeed, on all fours with the case with which we are dealing. This Court was presented with a copy of the original **condominium** plan that the Builder filed with the Registrar of Land Titles. The D&C Opinion, which formed part of the agreed Exhibit Book summarizes this Court's findings with respect to this aspect of this case when it said:

> I would direct you to the Schedule "A" attached to your original Lease from the owners to Batoni-Bowlen Enterprises Ltd. and would indicate that in my view it appears to be a copy of the surface of the **condominium** complex and while it does contain a detailed picture delineating the actual parking stalls in question, such is not delineated on the actual plan filed at the Land Titles Office in 1977 and accordingly Section 6(2) [*sic.*] of the **Condominium** Property Act has not been complied with respecting to these Leases and may for that reason alone be totally invalid.

26 The Defendant was empowered by its bylaws to lease the common property. However, the **condominium** plan that the Builder filed with the Registrar of Land Titles did not comply with the *Act*. While the Plaintiff argues that this amounts to a mistake and not an unauthorized transfer of leasehold that was made beyond the scope of power of the Board, this is a fundamental error. As a result, ***Carrington*** tells us that the 1978 Agreement is *ultra vires*.

27 The Plaintiff argued that if this Court finds the 1978 Agreement to be *ultra vires*, this Court should nonetheless find that it is enforceable. The Plaintiff argued that if, for many years, parties accept and act on an apparently invalid agreement, a court may nonetheless find that the parties are bound by its terms, citing ***Canadian Pacific Railway v. City of Calgary***, [1971] 4 W.W.R. 241 (Alta. S.C. - App. Div.). The Plaintiff cited two other cases in support of his argument, being ***Love's Realty & Financial Services Ltd. v. Coronet Trust*** (1989), 57 D.L.R. (4th) 606, 65 Alta. L.R. (2d) 362 (Alta. C.A.) (***"Love's Realty"***) and ***Still v. Minister of National Revenue*** (1997), 154 D.L.R. (4th) 229, 221 N.R. 127 (F.C.A.). In both those cases, the courts found that the agreements were expressly or impliedly prohibited by statute. Nonetheless, they allowed the agreements to be enforced.

28 In ***Love's Realty***, the court said at para. 27, quoting ***Archbolds (Freightage) Ltd. v. S. Spanglett Ltd.*** [1961] 1 Q.B. 374 at 390, "the avoidance of the contract would cause grave inconvenience and injury to innocent members of the public without furthering the object of the statute." Was the Plaintiff an "innocent member of the public"? He knew that there was an issue concerning the Impugned Stall. He even testified that he knew there was a risk, but decided to proceed with his purchase despite the risk. He presented no evidence to show that he paid a premium for the Unit based on the value of the Impugned Stall. In fact, the Unit was listed for $124,000 and he paid $108,000. There was a lack of due diligence on the part of the Plaintiff or his solicitor on his purchase of the Unit to determine the nature and scope of his risk. Had he relied on the Rodds, he might have even had a cause of action against them for misrepresentation on the listing sheet. This is not a case where a party relied on a misrepresentation on the part of the Board or the Defendant. By the time he purchased the Unit, the positions of the Board and Defendant were clear and a simple inquiry of either would have clarified this position. The original assignees of the leases pursuant to the 1978 Agreement might have had a cause of action as "innocent members of the public"; the Plaintiff does not.

29 The copy of the letter dated January 30, 1995, that the Plaintiff's lawyer received in which the Property Manager said that the Board provided the Rodds "a relaxation of the prohibition on further assignment to the purchaser of the Rodds unit" is vague. It is not so vague if one reviews the letters from the Property Manager to the Rodds, which is referenced in the January 30, 1995 letter from the Property Manager to the Plaintiff's lawyer, which makes the Board's position clear. If the Plaintiff's lawyer had not received copies of these letters, one wonders why he did not request them. The Plaintiff interpreted this vague statement to mean that he could assign the Impugned Stall to any subsequent purchaser from him. In the view of the circumstances, this was not a reasonable interpretation.

30 The Plaintiff also argued that the Defendant would be unjustly enriched if this Court were to find that the Defendant can retain the caretaker's unit which it received as consideration for the 1978 Agreement. He then defined unjust enrichment as "the retention of a benefit conferred by another, without compensation, in circumstances where compensation is reasonably expected." This Court does not disagree with this description of that concept, but does not agree with its application to this case. The Defendant may indeed be unjustly enriched by its retention of the caretaker's unit, but at whose cost? In other words, who is entitled to compensation? The Builder might have had a cause of action had a court found the 1978 Agreement to be *ultra vires* allowing the Defendant to retain the caretaker's unit while at the same time disallowing the Builder to retain or assign the parking stalls. Or even possibly an assignee of the parking stalls who shows that it paid a price to the Builder or subsequent assignee specifically for the parking stall with full knowledge of the Defendant or its Board, who allowed the assignment without taking steps to prevent it. Here, the

Plaintiff did not show the latter. In any event, this is a red herring inasmuch as the Plaintiff gains a benefit from the caretaker's unit as a resident of the **Condominium.**

31 The Plaintiff attempted to tender expert evidence of the value of the caretaker's unit and the Impugned Stall to show the amount to which the Defendant was unjustly enriched. This Court would not permit the Plaintiff to tender that evidence, as he had not complied with the *Alberta Rules of Court*. Because of the foregoing finding, this evidence was unnecessary in any event. However, if this Court were to compensate the Plaintiff for any such enrichment, the Plaintiff would gain a windfall inasmuch as he has suffered no loss from the Defendant being able to retain the caretaker's unit. This Court would be compensating the wrong party.

32 The Plaintiff argued that the 1997 Estoppel Certificate estops the Defendant from raising the facts as set forth in the 1995 Estoppel Certificate. The 1995 Estoppel Certificate said "the right to exclusive use will terminate at the time of subsequent sale of [the Unit] by [the Plaintiff]" whereas the 1997 Estoppel Certificate makes no mention of this.

33 The term "estoppel certificate" is not used in the *Act*. However, a person may request a **condominium** corporation to provide a statement setting out certain information concerning the financial and general status of the **condominium** corporation, including whether an owner is up to date in its contributions. The information prevents the **condominium** corporation from claiming a different set of facts and is "estopped" from so doing. It is not an agreement, as it has none of the trappings of an agreement, such as an offer, acceptance and the exchange of consideration. That said, a person could rely to their detriment on the contents of the statement and could suffer damages as a result.

34 The Plaintiff testified that he requested the 1997 Estoppel Certificate for the purpose of refinancing his unit and not to seek clarification of the status of the Impugned Stall. The Impugned Stall was not separately titled so his mortgagee likely did not care about the status of the Impugned Stall. The 1997 Estoppel Certificate speaks only of the common expense levies and addresses none of the other matters that a mortgagee or owner could request under the *Act*. This was not a situation in which a potential purchaser required much broader information concerning the financial and general status of the **condominium** corporation.

35 The Plaintiff argued that principles enunciated in ***Halifax County Condominium Corp. No. 5 Cowie Hill v. McDermaid*** (1982), 138 D.L.R. (3d) 356 (N.S.S.C., Tr. Div) (***"Halifax County"***) are applicable to this case. In that case, the **condominium** board passed a resolution allowing the board to borrow money several months before the McDermaids purchased their **condominium** unit. The borrowing resolution was not in the estoppel certificate. The **condominium** board issued a $1,500 assessment, which the McDermaids refused to pay. The court determined that the estoppel certificate should have referred to the borrowing information and that it was unrealistic to suggest that a purchaser was obliged to make an inquiry.

36 ***Halifax County*** is distinguishable from the case with which we are dealing. This case involves an estoppel certificate for the purpose of a refinancing and not a purchase. Had the Plaintiff wanted information concerning the Impugned Stall for his refinancing or any other purpose, he could have requested the Defendant to provide that information under section 44(n) of the 1980 Act, which was the legislation in force in 1997. That section requires the **condominium** corporation to provide "a copy of any lease agreement or exclusive use agreement with respect to the possession of a portion of the common property, including a parking stall or storage unit." His mortgagee likely did not require that information, nor any of the other information listed in the 1980 Act.

37 The Plaintiff argued that the 1997 Estoppel Certificate represented to him that the Defendant must have changed its position from the 1995 Estoppel Certificate and that he relied on that 1997 Certificate to his detriment. This Court fails to see how he relied on the 1997 Estoppel Certificate to his detriment, other than to let the matter rest. In ***Francis v. Condominium Plan No. 8222909*** [1999] A.J. No. 562, 1999 ABQB 366 at para. 16 (Master), the court said:

> The certificate is one issued pursuant to s. 36 **Condominium** Property Act. The Plaintiffs say that they relied on the certificates and the by-laws as they are when they bought their townhouse units. But the certificates do not and cannot freeze the facts for all time as they are at the time that the certificates are issued.

Does this mean that the facts stated in the 1995 Estoppel Certificate are not frozen for all time and they could change at the whim of the Board? With respect, any board that changes its policy so drastically in relation to an owner would surely advise the owner of such change. Here, the Board did not change its position from the time of its issuance of the 1995 Estoppel Certificate and the Plaintiff's assumption that it had, should have provoked an inquiry. Even had he

suffered a detriment, he did so of his own choosing, not through any representation from the Board through the 1997 Estoppel Certificate or otherwise.

38 The Plaintiff argued that the doctrine of promissory estoppel applies such that 1997 Estoppel Certificate was intended to affect the legal relationship between the Plaintiff and the Defendant and in reliance on the representation, the Plaintiff acted on it or in some way changed his position, ***Maracle v. Travellers Indemnity Co. Of Canada*** (1991), 80 D.L.R. (4th) 652 (S.C.C.). However, in ***Canadian Superior Oil Ltd. v. Paddon-Hughes Development Co.***, [1970] S.C.R. 932 at para. 15, the court said the doctrine of promissory estoppel "applies where a party to a contract represents to the other party that the former will not enforce its strict legal rights under it..." [emphasis added]. This Court has found that the 1997 Estoppel Certificate is not a contract, so the doctrine does not apply to the case with which this Court is dealing.

39 Similarly, the principle of *contra proferentum* does not apply to the facts with which we are dealing, as that principle applies only to ambiguous provisions of contracts prepared by one party to the detriment of another.

40 The Defendant conceded that if this Court determines that the 1978 Agreement and all resulting agreements are *ultra vires*, the Defendant is prepared to allow the Plaintiff to use the Impugned Stall until the Plaintiff sells the Unit. In other words, the Defendant is prepared to abide by its direction as contained in the 1995 Estoppel Certificate, notwithstanding this Court's determination that the 1978 Agreement is *ultra vires*.

41 The parties argued whether the Plaintiff was statute-barred from bringing this proceeding. Because of its findings, this Court need not deal with this issue. To complete the record, however, it will briefly provide its thoughts concerning this.

42 Part of the prayer for relief the Plaintiff was seeking was a declaration that the 1978 Agreement and documents flowing from it, are binding on the Defendant and requiring the Registrar of Land Titles to allow the Plaintiff to register his lease against the title. This is declaratory and not remedial and is an exception to the definition of remedial order in the *Limitations Act*, R.S.A. 2000, c. L-12, s. 1(I). The Defendant argued that the declaration simply begins a chain of events that results in a remedial order, which assumes that this Court would ultimately award damages. However, the Plaintiff pleaded damages for unjust enrichment in the alternative. Had this Court made the declaration the Plaintiff was seeking, it would have awarded no damages and imposed no duty on the Defendant. Because this Court found that the Defendant was not unjustly enriched, it awarded no damages in favour of the Plaintiff.

Costs

43 The Defendant is entitled to its costs for these proceedings. It seeks solicitor and client costs. Section 18(6) of the *Act* states the bylaws bind the owners of the units in the **condominium.** The Defendant's bylaws are registered at the Land Titles Office, so the Plaintiff is bound by the bylaws. The Defendant did not produce the bylaws for this Court to consider. However, it submitted that section 73(11) of the Defendant's bylaws states:

> The Corporation is entitled to recover from the owner, tenant, or occupant responsible indemnification for all legal costs (as between a solicitor and client) incurred by the Corporation as a result of any breach or contravention of a By-law or Article of Policy of the Corporation.

The Defendant produced no information to indicate that by commencing these proceedings, the Plaintiff breached or contravened the bylaws or article of policy of the Defendant. Thus, the Defendant is entitled to taxable party-party costs and no more.

K.D. YAMAUCHI J.

cp/e/qlrds/qlmxb/qlala