CITATION: Metropolitan Toronto Condominium Corporation No. 1250 v. The Mastercraft Group Inc., 2009 ONCA 584
DATE: 20090723
DOCKET: C46857

COURT OF APPEAL FOR ONTARIO

2009 ONCA 584 (CanLII)

Winkler C.J.O., Goudge and Epstein JJ.A.

BETWEEN

Metropolitan Toronto Condominium Corporation No. 1250

Plaintiff/Respondent (Appellant/
Respondent by way of cross-appeal)

and

The Mastercraft Group Inc., 188 Eglinton Inc., 188 Lofts Inc., Lomico 188 Inc., Bruce C. Greenberg and S-99 Limited

Defendants/Applicant (Respondents/
Appellants by way of cross-appeal)

Andrew Robinson and Patricia Conway, for the appellant

Bruce O'Toole and Amanda Heydon, for the respondents Lomico 188 Inc. and S-99 Limited

Allan Sternberg, for the respondents The Mastercraft Group Inc., 188 Eglinton Inc., 188 Lofts Inc., and Bruce C. Greenberg

Heard: February 10 and 11, 2009

On appeal from the order of Justice Romain W. M. Pitt of the Superior Court of Justice dated February 20, 2007, with reasons reported at (2007), 54 R.P.R. (4th) 260.

Goudge and Epstein JJ.A.:

I. OVERVIEW AND ISSUES

[1] This appeal raises four issues that arise from the establishment of a condominium at 188 Eglinton Avenue East, by the registration on May 16, 1999 of the declaration required by the legislation in effect at the time, the *Condominium Act*, R.S.O. 1990, c.26, (the *Act*).

[2] These issues are:

1. Whether the respondent Lomico 188 Inc. (Lomico), the owner of part of the building, whose interest was held by the respondent 188 Eglinton Inc. (Eglinton) as a bare trustee, is a "declarant" for the purposes of the *Act*.

2. Whether the lease under which the respondent S-99 Limited (S-99) purports to lease to the appellant (MTCC 1250) certain central heating, ventilating and air conditioning equipment (the HVAC equipment) that are said by MTCC 1250 to be part of the common elements of the condominium, is null and void.

3. Whether the respondents Eglinton, Lomico, and 188 Lofts Inc. (Lofts) breached the terms of the agreements of purchase and sale of the condominium units by failing to carry out repairs to the underground garage.

4. Whether Eglinton and Lomico breached the agreements of purchase and sale of the condominium units by failing to rent a parking space at market rates to each unit owner.

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[3] The trial judge answered no to the first question, yes to the second question, no to the third question, and yes to the fourth question. MTCC 1250 appeals the answers to the first three questions. The Eglinton and Lomico cross appeal the answer to the fourth question.

[4] We will address each of these issues in turn. In each instance it will be necessary to refer to the facts that are particularly relevant to that issue. To begin, however, a general review of the factual circumstances, none of which are significantly disputed, may be helpful.

II. BACKGROUND

[5] The building in question, 188 Eglinton Avenue East in Toronto, was constructed in the late 1970s as a commercial building with retail facilities on the ground floor and two floors of underground parking for tenants and visitors.

[6] In 1997, the respondent Mastercraft Group Inc. (Mastercraft) entered into an agreement to purchase the building in order to convert it to a condominium. Mastercraft incorporated three companies, Eglinton, Lofts, and Lomico to carry out this project. Before the purchase closed, Mastercraft assigned its interest in the agreement to Eglinton, which took title to the building on May 22, 1997.

[7] Lofts and Lomico each immediately entered into agreements with Eglinton whereby Eglinton held the underground parking floors, the ground floor with its retail

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facilities, and the eighth floor, in trust for Lomico and floors two to seven in trust for Lofts.

[8] Lofts carried out renovations on floors two to seven and began marketing the resulting residential units to purchasers in 1997. The first unit owners took possession in November 1998. By that point, although work on the conversion was still going on, all of the building systems, including heating, ventilation and air conditioning, were operational.

[9] On May 16, 1999, Eglinton registered the declaration and description of the condominium, as required by the *Act*. Pursuant to the *Act*, that created the appellant condominium corporation (MTCC 1250) and divided the freehold in the building into units and common elements.

[10] The respondent Greenberg was the principal of Mastercraft and controlled Eglinton, Lofts, and Lomico. He, his accountant and another associate constituted the board of directors of MTCC 1250from its inception on May 16, 1999 to July 22, 1999, when the turnover meeting required by the *Act* was held, and a new board of three unit owners was elected. Within a few months, the disputes began between the MTCC 1250 and the respondents that ultimately led to this litigation.

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III. ANALYSIS

1. The Declarant Issue

[11] The first issue is whether Lomico is a "declarant" for the purposes of the *Act* and therefore is fixed with the statutory obligations of a declarant.

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[12] The *Act* provides a statutory definition of "declarant". While it is true that the *Act* was repealed and replaced on May 5, 2001 by the *Condominium Act, 1998*. S.O. 1998, c.19 (the new *Act*) it is not in dispute that its predecessor, the Act, applies, and that there are no changes in the new *Act* that affect the action. The definition in s. 1(1) of the *Act* is:

> "declarant" means the owner or owners in fee simple of the land described in the description at the time of registration of a declaration and description of the land, and includes any successor or assignee of such owner or owners but does not include a purchaser in good faith of a unit who actually pays fair market value or any successor or assignee of such purchaser

[13] The facts of particular relevance to this issue are as follows. On the day it acquired title to the property at 188 Eglinton Avenue East, namely May 22, 1997, Eglinton acknowledged its grant of an option to Lomico to "to acquire the eighth floor of the property" for $346,000. On the same day, Lomico exercised the option and acquired the eighth floor for that amount. In return, Eglinton acknowledged that from that date it held the eighth floor in trust for Lomico.

[14] The chartered accountant who assisted Mastercraft in structuring the entire transaction gave evidence that it was critical for tax purposes that Lomico own the eighth

floor before the registration of the declaration on May 16, 1999, which is why it purchased that part of the property on May 22, 1997 for $346,000.

[15] On July 6, 2000, a deed executed on June 29, 2000 by Greenberg was registered purporting to transfer the 13 units on the eighth floor from Eglinton to Lomico for consideration of $2.00. However, the accountant's evidence was that on registration of the declaration, Lomico "surrendered its undivided interest [in the eighth floor] in exchange for the condominium units" and that it was a trade in kind of things of equal value rather than an exchange of funds. He said this was required for tax purposes so that Lomico could be said to own that interest in the building all the way through, prior to and after registration.

[16] Since then Lomico has retained ownership of the units on the eighth floor, renting seven of them out as residential units, with the rest being used as offices for Greenberg's companies. Neither the agreements of purchase and sale of the residential units elsewhere in the building nor the disclosure statement provided to prospective purchasers disclosed that the declarant intended to retain and lease out any specific residential units. It is clear, however, that the eighth floor units have never been offered for sale.

[17] At trial, MTCC 1250 argued, as it does here, that Lomico meets the statutory definition of "declarant" and as a declarant is fixed with the accompanying statutory obligations. The main obligation that MTCC 1250 appears to rely on is found in s.

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51(1)(b) of the *Act*, which MTCC 1250 says requires Lomico to promptly sell the eighth floor units that it has retained.

[18] The trial judge dismissed MTCC 1250's claim. He found that Lomico was a "*bona fide* purchaser for value of the assets involved at fair market value", and therefore was not a declarant, since it fell within the exclusion set out in the statutory definition.

[19] With respect, we do not agree with this reasoning. The statutory definition excludes "a purchaser in good faith of a unit who actually pays fair market value" (emphasis added). Here Lomico purchased the eighth floor of the building from Eglinton at fair market value when it exercised its option on May 22, 1997. As the evidence made clear, it was important for tax purposes that Lomico acquire that part of the property at that point, before registration of the declaration. The transaction was not and did not purport to be a purchase by Lomico of the proposed units on the eighth floor. That transaction therefore does not bring Lomico within the exclusion.

[20] Nor could the "exchange" on May 16, 1999 serve to do so. Post registration, Lomico could not and did not transfer its pre-registration ownership of the eighth floor to anyone "in exchange" for the units on the eighth floor. No one acquired ownership of the eighth floor from Lomico on May 16, 1999. Nor did anyone transfer the units to Lomico in return. The change of Lomico's ownership of the eighth floor into its ownership of the units on the eighth floor cannot qualify as a *bona fide* purchase of the units on the eighth floor at fair market value.

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[21] Rather, in assessing whether Lomico meets the statutory definition, the critical fact is that at the time of registration of the declaration, Lomico was the owner of the full interest in the eighth floor of the building subject only to Eglinton's holding that interest for it as a bare trustee.

[22] The question is whether that qualifies Lomico as "the owner or owners in fee simple" of the eighth floor of the building as set out in the statutory definition.

[23] In our view it does. The statutory definition must be read in light of the objective of the *Act* and the intention of the Legislature. Fundamental to the purpose of the "declarant" concept in the *Act* is the objective of identifying the true owner or owners of the property at the time of registration of the declaration in order to place certain responsibilities on them as the property is converted to a condominium under the *Act*. The meaning of the phrase "the owner or owners in fee simple of the land" must be informed by this policy objective even if the result may not exactly accord with the meaning that this phrase might have at common law. In a similar context, that of provincial assessment legislation, that is what this court did with the term "fee simple" in *Carsons' Camp Ltd. v. Municipal Property Assessment Corp.* (2008), 88 O.R. (3d) 741.

[24] Here, at the time of registration of the declaration, Lomico was the true owner of the eighth floor of the property, subject only to Eglinton's holding that interest in trust as a bare trustee. In light of the intent of the legislation, that qualifies Lomico as an owner in fee simple of the eighth floor of the property at the time of registration for the purposes

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of the statutory definition. If there be any doubt about Lomico's status as the owner of the eighth floor, then certainly, together with Eglinton, which holds the eighth floor in trust for it, Lomico and Eglinton are "the owners of the fee simple" of that part of the property as that phrase is used in the statutory definition, and therefore Lomico as well as Eglinton must be considered declarants. We therefore conclude that Lomico meets the statutory definition of "declarant".

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[25] The respondents argue that this reading would make a declarant of every purchaser of a unit before registration. We disagree. Prior to registration, such a purchaser holds an interest that is different from that of Lomico. If the condominium project did not proceed, Lomico's ownership of the eighth floor would survive. The interest held by the unit purchasers would not. Thus, the purchaser of a proposed unit cannot be said to be an owner of the fee simple of the property.

[26] We therefore would allow the appeal on the first issue and find that in these circumstances Lomico meets the statutory definition of a declarant and is fixed with the statutory obligations that flow from that. We did not receive full argument about what those obligations may be. If the parties cannot agree on this, we would order that they be free to have these issues resolved as part of the reference referred to in paragraph 91 of these reasons.

2. The HVAC Issue

[27] The second issue is whether the lease of HVAC equipment by S-99 to MTCC 1250 is null and void because its subject matter is included in the common elements of the condominium.

[28] There are a number of facts that are of particular relevance to this issue. The residential units on floors two through seven were sold under standard form agreements of purchase and sale. Lofts was the vendor. Each agreement conveyed an individual unit and a proportionate share of the common elements. The agreements did not exclude any fixtures or equipment from the sale.

[29] The disclosure statement that accompanied each agreement indicated that the chiller, a part of the air conditioning system, would be leased from Consumers Gas. However, when the gas company refused to do this, Lofts purchased new HVAC equipment and installed the equipment on the roof of the building. The only exception was that the original boilers were retained and refurbished.

[30] The heating, ventilating, and air conditioning equipment supply the hot water, the chilled water, the ventilation air and the emergency power for the building through piping, ducting and wiring. The equipment is connected to the building by that piping, ducting and wiring that run throughout the building. All this equipment was installed and in use by the time purchasers started to move in November 1998.

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[31] In March 1999, Greenberg caused a new company, S-99, to be incorporated. Greenberg was its president. There was evidence that, shortly after its creation, S-99 acquired the HVAC equipment from Lofts, although the only documentation of the sale was an invoice dated July 31, 1999 from Lofts to S-99 in the amount of $236,900.

[32] In May 1999, immediately after the registration of the declaration, a lease from S-99 to MTCC 1250 purported to lease the HVAC equipment to MTCC 1250 . Greenberg signed the lease for both parties, as president of S-99 and as president of MTCC 1250, a position he held until the turnover meeting on July 22, 1999.

[33] It is this lease that MTCC 125 attacks, arguing that the lease is null and void, because the HVAC equipment, being fixtures, are part of the common elements. MTCC 1250 argues that the unit holders therefore acquired equitable title to the equipment when they entered into their agreements to purchase their units. MTCC 1250 says that S-99 could not thereafter lease the equipment to MTCC 1250 because it did not own the equipment.

[34] The trial judge dismissed MTCC 1250's claim. Fundamental to his conclusion was his determination that the HVAC equipment constituted chattels rather than fixtures. That conclusion was based on a clause in the lease signed in May 1999, after registration of the declaration, in which the equipment was acknowledged to remain the property of the lessor, S-99, and was deemed by the parties to the lease to be personal or movable property.

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[35] With respect, we do not agree with this approach to determining whether the HVAC equipment constitutes fixtures or chattels. Although intention may be an important factor in answering that question in some factual circumstances, if S-99 could not lawfully lease the equipment to MTCC 1250 in May 1999 because of the ownership interest of the unit holders in it, the intention expressed in that document is irrelevant. The intention of the owners of the equipment is what matters.

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[36] The correct analysis must begin with the nature of the interest acquired by the purchasers of the units when they concluded agreements of purchase and sale prior to the registration of the declaration.

[37] In *York Condominium Corp. No. 167 et al. v. Newrey Holdings Ltd. et al.* (1981), 32 O.R. (2d) 458 (O.C.A.) (leave to appeal to the Supreme Court of Canada refused) this court made clear that once he starts to sell the units, the owner has a fiduciary duty to the purchasers of units that extends to the common elements. The court said this at p. 8:

> 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.

[38] It is clear that the HVAC equipment had been installed and was operational by November 1998, and by then the sale of units had commenced. If the HVAC equipment is included in the common elements, the fiduciary duty described in *York Condominium* that is owed to present and prospective unit purchasers extends to that equipment.

[39] If the equipment is properly considered to be fixtures, it is part of the common elements as an interest "appurtenant to" the property. This appears undisputed by the parties. In our view it is clear that, once installed and operational, this equipment must properly be characterized as fixtures. The equipment is affixed to the building by piping, ducting and wiring. The objective is to provide the services of heating, cooling and ventilation that is essential for the building to serve as a residential condominium: see *Stack v. T. Eaton Co. et al.* (1902) O.J. No. 155 (Div. Ct.), *per* Meredith C.J. This equipment can only be considered fixtures.

[40] The consequence is that the interests of the unit owners, present and prospective, in preserving the HVAC equipment as part of the common elements had to be protected by the owner once it began selling units. The equipment could not lawfully be separated from the remaining common elements, sold, and then leased back to MTCC 1250, at least not without the consent of the unit owners.

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[41] It is clear therefore that the trust obligation described in *York Condominium* bound Lofts and extended to the HVAC equipment. In purporting to sell the HVAC equipment to S-99, Lofts breached its trust obligation to the unit owners. Given the very close relationship between Lofts and S-99, and the involvement of Greenberg in both, S-99 cannot be said to have purchased the equipment without notice of the owners' beneficial interest. Because S-99 was not a *bona fide* purchaser for value without notice, it is subject to the same fiduciary duty owed to the unit owners as Lofts: see *Waters' Law of Trusts in Canada* (3rd ed.) p. 1272.

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[42] When the declaration was registered on May 16, 1999, the unit owners became the owners of the common elements, including the HVAC equipment. S-99 thereafter had no interest in the equipment and hence no interest in what it purported to lease to MTCC 1250 shortly after registration. The purported lease is therefore null and void.

[43] We would therefore allow the appeal on the second issue, and issue a declaration that the HVAC equipment is included in the common elements of the condominium and that the purported lease of that equipment between S-99 and MTCC is null and void.

3. The Repairs to the Parking Garage Issue

[44] This issue concerns whether Eglinton, Lofts and Lomico breached the terms of the agreements of purchase and sale of the condominium units by failing to carry out repairs to the underground garage.

[45] While MTCC 1250 originally advanced its claim for expenses that will be incurred in repairing the garage on the basis of a number of different grounds, on appeal it based its argument primarily on breach of the construction warranty provision contained in the agreement of purchase and sale between Lofts and each initial purchaser. Paragraph 26 of each agreement provides as follows:

> The Purchaser acknowledges that the Building is a substantial renovation of an existing building and that the base building remains as originally constructed. The foregoing shall constitute complete and absolute acceptance by the Purchaser of all construction matters, and the quality and sufficiency thereof, including, without limitation, all mechanical, structural and architectural matters. The Purchaser agrees that the foregoing may be pleaded by the Vendor as an estoppel in any action brought by the Purchaser or his successors in title against the Vendor. The Vendor reserves the right, in its sole and unfettered discretion, to make changes to the plans and specifications and/or alter the design or layout of the Units or common elements and/or substitute materials provided that such materials are substantially equal in quality to the materials so replaced....

[46] In oral argument, as a preliminary issue, Eglinton and Lofts challenged whether the parking garage formed part of the building described as a "substantial renovation".

[47] In our view, the trial judge correctly proceeded on the basis that Eglinton and Lofts committed to convey units in a substantially renovated building and that this commitment included the garage. The disclosure statement supports this conclusion in that its detailed description of the building includes the parking units available to the condominium unit owners.

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[48] The events relevant to the alleged deficiencies of the underground parking garage began in 1996 when Mastercraft retained Reid Jones Christoffesen (RJC) to carry out a pre-purchase inspection of the P1 slab of the garage. RJC delivered two reports dated July 29 and August 2, 1996. In the first report, RJC identified cracks and chloride contamination and concluded that the membrane may have failed. Further tests were recommended. The second report described significant areas of top surface deterioration and RJC recommended repairing 15% of the slab surface.

[49] On September 28, 1998, Kremisco Engineering Inc. delivered a report to Lofts containing specifications for the substantial work that needed to be done on the garage ramp and adjacent areas. These repairs included, among other things, removing existing topping and deteriorated concrete, and installing new heating cables and a new waterproofing system.

[50] It follows that, well before turnover, Greenberg knew the 20-year-old garage had deteriorated and needed to be repaired. In his discovery evidence read in at trial, Greenberg said that he assumed the repairs to the parking garage had been completed in accordance with the specifications the consultants had identified in their reports, and in particular that the membrane had been replaced.

[51] However, none of the work on the ramp recommended by the Kremisco report was done, nor were any of the repairs recommended by RJC. The membrane was not replaced; instead, the entire garage was merely painted.

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[52] The purchasers of the condominium units were not aware nor were they able to be aware of the deteriorated and damaged state of the garage either before they purchased their units or when they took possession. What they saw when they moved in was a garage with a fresh coat of white paint.

[53] After turnover in July of 1999, the MTCC 1250 board of directors commissioned a technical audit of the building. The audit showed moisture in the slab and significant areas of delamination and cracks in the topping on both the ramp and the P1 slab. Eglinton did not respond to MTCC 1250's request to address these deficiencies.

[54] In a report dated June 26, 2006, prepared at the request of MTCC 1250, Halsall Associates Limited commented on the technical audit and prepared a reserve fund study. Halsall recommended that the extensive repairs to the garage be carried out within two years to avoid salt water contamination and minimize additional membrane and concrete deterioration.

[55] At trial, expert evidence was presented on behalf of both sides. The experts agreed that while the garage remained structurally sound and functional, it needed to be repaired. They could not agree, however, on how much the repair work would cost.

[56] The trial judge's conclusion that there was no breach of the construction warranty provision in the agreements of purchase and sale is succinctly set out in para. 126 of his reasons, as follows:

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> In any event, the evidence does not demonstrate a breach of the construction warranty in the Agreements of Purchase and Sale when paragraph 26 of that document...is given its proper construction. There was nothing in the Agreements of Purchase and Sale requiring the defendant to complete renovations in accordance with any particular specifications.

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[57] The trial judge also held that a damage award could not be justified in the light of the evidence that the garage was functional and structurally sound, there was little measurable difference in the extent of delamination between 1996 and 2006, and through the issuance of estoppel certificates MTCC 1250 had represented to subsequent purchasers that it was not considering any substantial repairs.

[58] With respect, in our view, the trial judge applied the wrong legal test in his determination of whether the substantial renovation required of the parking garage was performed and properly so. Finding no breach of the construction warranty provision on the basis that there was no obligation to renovate in accordance with particular specifications was not the correct approach. The trial judge was required to give meaning to the construction warranty provision by interpreting the legal obligation imposed by the words "substantial renovation".

[59] Contracts are to be interpreted in a manner that gives effect to the reasonable expectations of the parties. The search for this intention is an objective one. The focus is on what a reasonable person would infer from the words used, an examination of the entire contract and a consideration of the relevant legal and factual background against which the contract was entered into: see *Ventas, Inc. v. Sunrise Senior Living Real Estate*

Investment Trust (2007), 85 O.R. (3d) 254 (C.A.), at para. 24; *3869130 Canada Inc. v. I.C.B. Distribution Inc.* (2008), 239 O.A.C. 137 (C.A.), at paras. 31-32; *ATCO Electric Ltd. v. Alberta (Energy and Utilities Board),* [2004] 11 W.W.R. 220 (Alta. C.A.), at paras. 76-77.

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[60] Applying this interpretive approach to the determination of the meaning of the substantial renovation obligation, the trial judge should have considered not only the words contained in the agreement of purchase and sale but also the context or factual matrix surrounding the contract.

[61] In our view, the purchasers of the units reasonably intended to purchase a unit in a substantially renovated building with a substantially renovated parking garage, and that is what Eglinton and Lofts promised to deliver. Greenberg's evidence was that he assumed that repairs to the garage would be carried out in accordance with the recommendations of RJC and Kremisco. Doing nothing more than paint the garage fell far short of the parties' reasonable expectations. Accordingly, Lofts breached the construction warranty it gave to the purchasers.

[62] We therefore would allow the appeal on this issue and, pursuant to s. 14 of the Act, award damages in favour of MTCC 1250 that flow from this breach.

[63] The record and argument are insufficient to allow us to assess the amount of these damages and the extent to which, if any, issues such as MTCC 1250's alleged failure to

mitigate and any discount appropriate to its use of the garage since November of 1998 should affect the damage assessment. Accordingly, unless the parties are able to come to an agreement, the damages should be determined by way of a reference that more fully explained in paragraph 91 of these reasons.

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4. The Cross-Appeal – The Right to Lease a Parking Space Issue

[64] The cross-appeal involves the issue of parking, in two respects: (i) the condominium owners' entitlement to rent parking spots; and, (ii) the market rate to be charged in order to exercise that entitlement.

[65] In identifying the particular facts relevant to this issue, we start with the documents.

[66] Pursuant to the agreement between Lomico and Eglinton described above, as of registration on May 16, 1999, Lomico was the beneficial owner of the parking garage, and therefore Eglinton was entitled to lease parking units on Lomico's behalf.

[67] Eglinton provided the original purchasers with a disclosure statement containing the following information about parking on p. 2:

> There is no restriction on the sale or lease of units. In particular, parking units, storage units, communication units or pylon sign units may be sold or leased to any person or corporation and not limited to commercial/residential unit owners in the Retail Condominium or the Commercial Condominium and may be retained by the Declarant. Ownership of a commercial/residential unit does not include a parking unit. Each owner of a commercial/residential unit

> *shall* be entitled to lease a parking unit from the Declarant at market rates, currently $85.00 per month. (Emphasis added.)

[68] The agreements of purchase and sale entered into between original purchasers and Lofts contain the following provision:

> The Purchaser acknowledges that parking is not included in the Purchase Price. Parking is available at market rates (currently $85.00 per month) and *may* be leased from an affiliate of the Vendor. (Emphasis added.)

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[69] The declaration states, at article 4.1(g)(ii), only that "[p]arking units may be owned by or leased to non-owners or occupants of commercial units."

[70] Original purchasers received all of these documents. Purchasers of resale units received only the declaration.

[71] The evidence discloses that initial purchasers of a condominium unit were given the right to rent a parking space at the then prevailing market rate of $85 per month. As a result of various disputes between members of the board of directors of MTCC 1250 and Greenberg, Lomico cancelled the parking privileges of the directors who were most involved in the disputes. Accordingly, MTCC 1250, in this action, seeks an order requiring Lomico, Eglinton and Lofts to lease parking spaces at market rates to owners of condominium units.

[72] The issue facing the trial judge was what parking rights, if any, inhere in the ownership of a condominium unit.

[73] In considering this issue, the trial judge proceeded, at para. 53, on the basis that he was entitled to consider all relevant circumstances in attempting to make sense of the provisions in these various documents. In addition to reviewing the documents already mentioned, he noted, at para. 54, that in order to obtain a building permit, Eglinton was required to undertake to the city that a minimum of 82 parking spaces would be provided, 71 for residents and 11 for visitors, and, at para. 55, that the "features sheet" provided to prospective purchasers indicated that owners would be given priority for parking.

[74] In view of these factors, along with the *contra proferentem* rule, according to which an ambiguous term in a contract will be construed against the interests of the party who imposed it, the trial judge concluded, at para. 59, that "[w]hen all of the evidence is considered, the irresistible inference to be drawn is that as long as they were prepared to pay market rates, a parking space would be available to unit owners."

[75] The trial judge subsequently released an endorsement addressing the fact that his original judgment ordered, at para. 4, "that [Lomico] shall lease available parking units to original purchasers of units at MTCC 1250 at market rate...". In the endorsement, he clarified, at para. 9, that in his reasons he decided that "a unit owner who is prepared to pay the market rate was entitled to a parking space; *not* that original purchasers prepared to pay a market rate were entitled to a parking space" (emphasis in original). Accordingly, at para. 10, he amended his judgment to read: "This Court declares that

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[Eglinton] breached the parking agreement by failing to lease parking spaces to unit owners of [MTCC 1250] at market rates."

[76] Lomico does not appear to take issue with the trial judge's finding that each original purchaser has such a right. However, Lomico submits that the trial judge fell into error by relying on evidence that applied only to original purchasers in concluding that subsequent unit owners were entitled to lease a parking space. To bolster their argument that the trial judge should have confined the right to lease a parking spot to original purchasers, Lomico and Eglinton also rely on the trial judge's finding, at para. 49, that there was no evidence before him that subsequent purchasers had any expectation of an entitlement to parking.

[77] The expectation of subsequent purchasers, however, is not determinative of this issue, given that the right to lease a parking space is a property right, as is explained below.

[78] As previously mentioned, in interpreting a contract, the court must strive to give effect to the reasonable expectations of the parties, taking into consideration the words used, the entire contract and the surrounding circumstances. This is precisely what the trial judge did. In the original agreements of purchase and sale, Lofts represented to the original purchasers of units that they would be able to lease a parking space at market rates, and in the disclosure statement, the declarant represented owners would be entitled to lease a parking space. According to the trial judge, "[t]hat representation meant

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something." In other words, the right to lease a parking space was part of the consideration in return for the payment of the purchase price of each condominium unit. Turning to the surrounding circumstances, the trial judge noted that in order to obtain a building permit the developer gave an undertaking to the City of Toronto that parking spaces would be available for the condominium owners and their guests. In addition, the promotional features sheet given to prospective purchasers represented that secure underground parking would be available at market rates, and that unit owners would be given priority for reserved spaces.

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[79] These factors support the conclusion that the parties did not intend that the right to lease a parking spot would be merely a personal benefit. Rather, it was an appurtenance to each residential unit.

[80] There is other evidence capable of supporting this conclusion. All of the relevant provisions in the documents refer to "owners" *simpliciter*, as opposed to "original owners". Furthermore, pursuant to article 5.1 of the declaration, MTCC 1250 was required to repair and maintain the parking units. It would not make sense to contemplate an arrangement where, over time, the condominium owners would maintain and repair a garage they were not allowed to use.

[81] Although he did not specifically identify the right in issue as an easement, the trial judge's findings of fact and analysis support the conclusion that the right to rent a parking spot is an easement appurtenant to each residential unit, which Lofts, as agent for

Lomico, granted to initial owners of condominium units. Since easements automatically run with the land, it follows that the right to rent the parking units is part of what is conveyed from residential unit owner to residential unit owner, and we would so declare.

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5. Determination of Market Rate

[82] This takes us to the final issue of how to determine the market rate to be paid by those who choose to exercise the right to rent a parking space.

[83] Eglinton and Lomico submit that the trial judge exceeded his jurisdiction by ordering that the market rate be determined by arbitration. The parties did not agree to submit the matter to arbitration, and there is no provision in the Act conferring jurisdiction to refer the issue to arbitration. They contend that the trial judge was obliged to decide the issue based on the evidence before him.

[84] MTCC 1250 takes what may be referred to as a middle ground. It admits that the *Rules of Civil Procedure* "do not specifically accord to [judges] the right to direct the parties to arbitration". However, ordering parties to arbitrate is analogous to directing a reference and thus an arbitration order is available through a combination of Rule 54 and rule 1.04(2). Rule 54 stipulates the circumstances under which a judge may direct a reference, and rule 1.04(2) states, "Where matters are not provided for in these rules, the practice shall be determined by analogy to them." MTCC 1250 goes on to suggest that once a judge has ordered parties to arbitrate, they would simply utilize the procedures set

forth in the *Arbitration Act, 1991*, S.O. 1991, c.17, instead of Rule 55, which sets out the procedure to be used on a reference.

[85] The problem with this approach is that the *Arbitration Act* applies to an arbitration conducted under an arbitration agreement (except in certain circumstances) and to an arbitration conducted in accordance with another act: ss. 2(1), 2(2) and 2(3). The parties have not executed an arbitration agreement and the Act does not provide for arbitration in this situation.

[86] Section 132(1) and (2) of the Act states that the following agreements will be subject to mediation and arbitration:

1. An agreement between a declarant and a corporation.
2. An agreement between two or more corporations.
3. An agreement described in clause 98(1)(b) between a corporation and an owner.
4. An agreement between a corporation and a person for the management of the property.

[87] The agreement in this case is between Eglinton and Lofts, on the one hand, and the condominium owners on the other. Clause 98(1)(b) deals with an agreement between an owner and the condominium corporation to make alterations to the common elements, and thus is not applicable to this case. Since there is nothing in the evidence to suggest that any of the condominium owners are corporations, this section does not apply.

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[88] Section 134 also provides for arbitration when certain parties seek an order enforcing compliance with the Act or various other documents, but only if the mediation and arbitration processes described in s. 132 are available. For the same reason, then, this section is also not applicable.

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[89] Thus, the *Arbitration Act* would not apply to the arbitration directed by the trial judge. With no agreement and no statutory guidance, the arbitration route is simply not a feasible way to resolve this issue. Therefore, even if it is within the inherent jurisdiction of a Superior Court judge to order an arbitration, doing so is not practical in this context.

[90] This leads to the possibility of a reference. Rule 54.02(1) of the *Rules of Civil Procedure* sets out the circumstances under which a reference may be directed:

> 54.02(1) Subject to any right to have an issue tried by a jury, a judge may at any time in a proceeding direct a reference of the whole proceeding or a reference to determine an issue where,
>
> (a) all affected parties consent;
>
> (b) a prolonged examination of documents or an investigation is required that, in the opinion of the judge, cannot conveniently be made at trial; or
>
> (c) a substantial issue in dispute requires the taking of accounts.

[91] In our view, there should be a reference to resolve the following issues: (i) the amount Lofts should pay as damages for failure to repair the garage; and, (ii) the market rate to be paid for the rental of the parking spaces. These issues meet the criterion in the

second half of 54.02(1)(b), namely, an investigation is required that could not conveniently be made at trial.

[92] Eglinton and Lomico argue that a reference is not available, given that a reference should not be directed where it would require litigants to lead evidence before the referee, all or most of which had already been led before the trial judge. The problem with this argument is that the necessary evidence was not lead at trial in relation to any of the three issues.

[93] The reference is to be presided over by a judge of the Superior Court of Justice, unless the parties agree otherwise. MTCC 1250 will have carriage of the reference.

IV. CONCLUSION

[94] For these reasons we would allow the appeal and dismiss the cross-appeal, in accordance with these reasons.

[95] Upon the agreement of counsel for all parties, we would order costs in favour of MTCC 1250 in the amount of $35,000.

RELEASED:

"GE"
"JUL 22 2009"

"Stephen Goudge J.A."
"G.J. Epstein J.A."
"I agree W. Winkler C.J.O."

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