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Court of Queen's Bench of Alberta

Citation: Owners: Condominium Plan No. 822 1011 v. 775601 Alberta Ltd., 2004 ABQB 692

Date: 20040927
Docket: 0303 15693, 0403 08428
Registry: Edmonton

Between:

Action No. 0303 15693

The Owners: Condominium Plan No. 822 1011

Plaintiff

- and -

775601 Alberta Ltd. and Doug Dueck

Defendants

Between:

Action No. 0403 08428

775601 Alberta Ltd. and Doug Dueck

Applicants

- and -

The Owners: Condominium Plan No. 822 1011

Respondent

Reasons for Judgment
of the
Honourable Mr. Justice Jack Watson

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[1] [ORALLY[1]:] This is Action No. 0303-15693, the matter of The Owners of the Condominium Plan No. 822 1011 as Plaintiff and 775601 Alberta Ltd. and Doug Dueck as Defendants and Action No. 0403-08428, the matter of 775601 Alberta Ltd. and Doug Dueck as Applicants and The Owners of the Condominium Plan No. 822 1011 as Respondent[2].

[2] In relation to this matter, there has been brought initially to me an Originating Notice of Motion on behalf of 775601 Alberta Ltd. and Doug Dueck as Applicants and the Owners of the Condominium Plan as Respondent relative to a *caveat* which was filed as against the unit which can be described as Unit Number 55 in the condominium plan, which itself can be named the Dunluce Village Joint Venture.

[3] In response to that particular Originating Notice of Motion, which actually asks for other relief, the Owners of the Condominium Plan applied for relief under Section 17 of the *Civil Enforcement Act*[3].

2. Procedural Context

[4] To set the procedural record straight, I should start by describing the Originating Notice on behalf of 775601 Alberta Ltd. and Doug Dueck as providing for, firstly, an Order requesting that a caveat filed against that particular Unit 55 be removed and discharged. I should mention in passing that, in fact, it was discharged voluntarily by Counsel at some point in the process.

[5] Secondly, under the Originating Notice of Motion, there was an application to discharge a further Certificate of *lis pendens*, which was also registered as an instrument against that Unit 55.

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1 Edited for publication. Headlines and footnotes added.

2 The latter half of this introductory sentence was not expressed orally.

3 Section 17 provides for pre-judgment attachment orders. Section 17(2) of the *Civil Enforcement Act*, R.S.A. 2000, c. C-15 provides as follows: "17(2) On hearing an application for an attachment order, the Court may, subject to subsection (4), grant the order if the Court is satisfied that (a) there is a reasonable likelihood that the claimant's claim against the defendant will be established, and (b) there are reasonable grounds for believing that the defendant is dealing with the defendant's exigible property, or is likely to deal with that property, (i) otherwise than for the purpose of meeting the defendant's reasonable and ordinary business or living expenses, and (ii) in a manner that would be likely to seriously hinder the claimant in the enforcement of a judgment against the defendant."

[6] Thirdly, the Originating Notice of Motion brought by 775601 Alberta Ltd. and Doug Dueck sought costs of the application and such further and other relief, which may seem just and the nature of the case requires.

[7] The Originating Notice of Motion lists a variety of things as relevant circumstances and grounds. It does not specifically set out Section 190(1) of the *Land Titles Act*[4], but in fact, during the course of oral argument, that particular section of the *Land Titles Act* was brought into play as part of the discussion and within the scope of further and other relief which was a consideration in this instance.

[8] As mentioned earlier, the Condominium Corporation replied with an application for relief under Section 17 of the *Civil Enforcement Act* which, to some extent, might be a moot point if, in fact, the application relative to the *lis pendens* were unsuccessful from the point of view of Mr. Dueck and 775601 Alberta Ltd. It would not be entirely moot since, obviously, the application under Section 17 of the *Civil Enforcement Act* could, in technical terms, reach at or after more property than might be the subject matter of the *lis pendens* itself.

3. Factual Context

[9] I should mention – in terms of factual context – that the subject Corporation, 775601 Alberta Ltd., has been described by an affidavit filed on behalf of the Applicants 775601 Alberta Ltd. and Doug Dueck as being as follows: "The Dunluce Village Joint Venture which is 775601 Alberta Ltd.". That is part of the factual context, which is legitimately before me for the purposes of making the determinations which I have to in relation to these two countervailing motions[5]. The two motions do overlap in terms of their scope of interest.

4. Motion as to the Lis Pendens

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[4] Section 190(1) of the *Land Titles Act*, R.S.A. 2000, c. L-4, provides as follows: "190(1) In any proceeding respecting land or in respect of any transaction or contract relating to it, or in respect of any instrument, caveat, memorandum or entry affecting land, the judge by decree or order may direct the Registrar to cancel, correct, substitute or issue any certificate of title or make any memorandum or entry on it and otherwise to do every act necessary to give effect to the decree or order."

[5] In addition, the Plaintiff Condominium Corporation produced without objection before me documents of the Alberta Corporation Registry disclosing that as of July 20, 2004, 775601 Alberta Ltd. had its registered office in St. Albert, Alberta, but its directors were the Defendant Doug Dueck and one John Redekop, while its shareholders were John Redekop and Premier Pacific Developments Ltd., all located in Abbotsford, British Columbia.

[10] Turning back to the Originating Notice of Motion which was brought on behalf of the numbered company and Mr. Dueck, the basic contention that is made in that instance is that the Statement of Claim which was initially filed on behalf of the Condominium Corporation – that is to say Dunluce Village Condominium Corporation – sought, by way of relief, the following things:

> (a) A declaration that the parking lease granted to the developer is void at the outset;
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> (b) An accounting as to all revenues received by the Defendants from the leasing and purported sales of the common property parking stalls;
>
> (c) Damages in the amount of all revenues received by the Defendants from the leasing and purported sales of the common property parking stalls to be paid to the Plaintiff;
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> (d) A declaration that the common property meeting room shall be properly part of the common property for the benefit of the Plaintiff;
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> (e) Unpaid condominium fees in the amount of $10,896.55;
>
> (f) Damages in the amount of $47,500.00 being the costs, which the Plaintiffs reasonably estimates will be incurred in repairing these deficiencies;
>
> (g) Prejudgment interest and costs –

– and so forth.

[11] The argument made on behalf of Mr. Dueck and the numbered company is that the foregoing list of forms of relief which are sought by way of the Statement of Claim is not a list which contains within it claims that are amounting to an interest *in land* itself.

[12] In relation to that particular point, what the numbered company and Mr. Dueck are contending is that by virtue of the terms of Section 148(1) of the *Land Titles Act*, the basis of a *lis pendens* must be an interest *in land*.

[13] Section 148(1) of the *Land Titles Act* provides as follows:

> 148(1) A person claiming an interest in any land, mortgage or encumbrance may, instead of filing a caveat or after filing a caveat, proceed by way of action to enforce the person's claim and register a certificate of *lis pendens* in the prescribed form.

[14] In this particular respect, it would appear clear that that is what happened insofar as the technical character of what occurred – namely, that the Owners of the Condominium Plan firstly filed a caveat which has since been discharged and then filed the *lis pendens*.

[15] The position taken on behalf of the Condominium Corporation, however, is that the *lis pendens* is supported, at least in part, by the various claims made in the Statement of Claim and that, as a consequence, it is lawfully a *lis pendens* on the property and should be allowed to remain.

[16] Turning to that list of items in the Statement of Claim – and discussing whether or not they reflect interests in land – it was effectively conceded during the course of argument that unpaid condominium fees in relation to the land were, in fact, an interest in land for the purposes of this particular *lis pendens* having validity within the meaning of Section 148(1) of the *Land Titles Act.*

[17] There was some disagreement – it appeared to me – as to whether or not some of the other issues raised interest in land for the purposes of supporting the claim under Section 148(1) of the *Land Titles Act.*

[18] For instance, the claim for damages in relation to this matter turns in part on the fact that, as alleged in the Statement of Claim, it would appear that the Defendants – that is to say the numbered company in particular – sold the parking stalls and received money for the sale of those parking stalls.

[19] The Defendants have not, in fact, accounted to, apparently, the Plaintiffs in this instance, as of yet. They did so in violation of the Condominium Property Act and according to the decision of the Court of Appeal of Alberta in ***Carrington***[6]. They did so in breach of a form of trust which can be applied to this particular situation.

[20] Part of the disagreement, then, between Counsel in relation to the question of whether an interest in land is involved concerned whether or not that particular money, or the proceeds of the sale of those parking stalls, carried forward an interest in land for the purposes of supporting the registration of the *lis pendens* under Section 148(1) of the *Land Titles Act.*

[21] This is an interesting point. It is clear to me that one can justify a *lis pendens* against land under either the *Land Titles Act* or under the authority of other statutes such as the *Matrimonial Property Act* or other provisions of statutes where, in the wisdom of the Legislature, the Legislature considers it appropriate to justify tying up land in such a manner and

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[6] The Owners: Condominium lan No. 992 5205 (Carrington Grande Whitemud) v. Carrington Developments Ltd., et al., (July 8, 2004) [2004] A.J. No. 798 (QL), 2004 CarswellAlta 881 (Alta. C.A. No. 0203-0290-AC; 2004 ABCA 243).

supporting the claims made in relation to that land by way of such an instrument as a Certificate of *lis pendens*.

[22] In this particular instance, it is not entirely necessary for me to attempt to *resolve* whether the proceeds of the sale of the parking stalls is such as to convey an interest in land or not. That is probably what a trial would do in relation to this particular point and it seems to me, therefore, that I should defer on that particular point.

[23] However, that returns me to the position that is taken on behalf of the condominium corporation, which is that the Certificate of *lis pendens* against the land is still valid.

[24] It is significant to point out that Section 148(1) of the *Land Titles Act* does not quantify or monetarize the interest which is supposed to be the subject matter of a *lis pendens*. In this instance, therefore, it is still fair to say on the evidence before me that there is some evidence that the *lis pendens* is justified in law at least in relation to the unpaid condominium fees.

[25] The creative argument that is brought on behalf of Mr. Dueck and the numbered company is that because the amount of the claim contained in the *lis pendens* exceeds that which is plainly within the meaning of an interest in land, it should be possible for the person who holds the land, or is the owner of the land, to pay into court the amount which covers the claim as to interest in land and thereby undermine the validity of the registration of the Certificate of *lis pendens* under Section 148(1) of the *Land Titles Act*.

[26] This creative argument would adapt to the situation that Counsel said occurs in relation to builders' liens where one can remove the builder's lien from the property by paying out *only* the builder's lien claim and not any other additional or supplementary damages, which the builder's lien claimant might actually have[7].

[27] The idea that is put forward by Counsel for the numbered company and Mr. Dueck is that the importance of the Land Titles system in this jurisdiction is such that one should not allow land to be tied up by claims that are not justified by statute in this instance – the claims being under Section 148(1) through the method of the *lis pendens*.

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[7] Counsel was presumably referring to such as Section 27(1) of the *Builders' Lien Act*, R.S.A. 2000, c. B-7, which provides as follows: "27(1) On the expiration of 45 days from the day that the contract is completed, payment of the major lien fund may be validly made so as to discharge the owner's liability in respect of all liens that are a charge on the major lien fund, unless a statement of lien is registered." See also Section 153 of the *Land Titles Act*. It is not necessary for me to deal with whether Counsel's summary of this analogy is correct.

[28] In a sense, the position on behalf of the numbered company and Mr. Dueck is that unless the *lis pendens* can be specifically bought out by paying into court the amount of the claim that is contained by the *lis pendens* which is an interest in land, then one is faced with a predicament that anybody with a $1.00 claim against a piece of property can file a legitimate *lis pendens* against that property for $10,000,000.00 and thereby tie that property up for any length of time that may arise under the particular circumstances, without any relief being possible for that particular individual who is the, you might say, victim of the *lis pendens* against that particular piece of property.

[29] Quite apart from tortious issues that may arise in connection with doing something of that sort, I have to say that I am in agreement with Counsel for the Condominium Corporation insofar as how *lis pendens* are to be discharged under the particular part of the *Land Titles Act* to which reference has been made.

[30] The process is as occurred in the decision before the Master in ***Becker Developments***[8], namely by an effort, pursuant to Section 152 of the *Land Titles Act*[9], to get a decision from the Court saying that the proceedings are discontinued or dismissed and the time for commencing an appeal from them has expired within the meaning of Sections 152(a)(ii) and (i).

[31] The idea there is that in order to achieve that particular result within the meaning of Section 152 of the *Land Titles Act*, a party should apply on a pre-trial basis if necessary under

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8 Becker Developments Ltd. v. Alberta (Her Majesty the Queen), (April 12, 1996) 2 R.P.R. (3rd) 23, 185 A.R. 20, [1996] A.J. No. 341 (QL), 1996 CarswellAlta 317 (Alta. Q.B. No. 9603 04264; Funduk M.C.). See also the learned Master's supplementary reasons at Becker Developments Ltd. v. Alberta (Her Majesty the Queen), (April 17, 1996) 185 A.R. 25, [1996] A.J. No. 431 (QL), 1996 CarswellAlta 318 (Alta. Q.B. No. 9603 04264; Funduk M.C.). This case reflects the use of a strike out motion under s. 129 of the *Alberta Rules of Court*, AR 390/68 to terminate the lawsuit on which the claim of interest in land is based.

9 Section 152 of the *Land Titles Act*, R.S.A. 2000, c. L-4, provides as follows: "152 The Registrar shall cancel the registration of a certificate of lis pendens on receiving (a) a certificate under seal of the clerk of the court stating that the proceedings for which the certificate of lis pendens was granted are (i) discontinued, or (ii) dismissed and the time for commencing an appeal has expired and no appeal has been commenced, or if commenced, has been finally disposed of or discontinued, (b) a withdrawal of the certificate of lis pendens signed by the person on whose behalf the certificate was registered, or (c) where a certificate of lis pendens relates to a caveat that was signed by an attorney or an agent, a withdrawal of the certificate of lis pendens signed by (i) the attorney or the agent, as the case may be, or (ii) the person on whose behalf the certificate was registered."

Rule 129 for some form of abuse of process or striking of pleadings relief[10] or under Rule 159 for summary judgment[11], which would thereby bring the litigation which founds the *lis pendens* registration to an end[12].

[32] I have come to be persuaded that Counsel for the Condominium Corporation is correct that in order to remove a *lis pendens* under that particular rubric, one would have to comply with Section 152 of the statute and proceed in the manner which occurred in the ***Becker*** case as I have mentioned.

[33] However, in light of the possible injustice that may occur in relation to land titles on the point that is raised by Counsel for Mr. Dueck and the numbered company, it seems to me that one should give some teeth to Section 190(1) of the *Land Titles Act* in relation to the possibility of correcting certificates of title.

[34] While I am not going to exercise that particular jurisdiction in this instance, I do think that there is some merit and somebody should argue someday whether or not that particular

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[10] Rule 129(1) of the *Alberta Rules of Court*, AR 390/68 provides as follows: "129(1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that (a) it discloses no cause of action or defence, as the case may be, or (b) it is scandalous, frivolous or vexatious, or (c) it may prejudice, embarrass or delay the fair trial of the action, or (d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly."

[11] Rule 159(2) of the *Alberta Rules of Court*, AR 390/68 provides as follows: "159(2) A defendant may, after delivering a statement of defence, on the ground that there is no merit to a claim or part of a claim or that the only genuine issue is as to amount, apply to the court for a judgment on an affidavit sworn by him or some other person who can swear positively to the facts, stating that there is no merit to the whole or part of the claim or that the only genuine issue is as to amount and that the deponent knows of no facts that would substantiate the claim or any part of it."

[12] For example, on summary judgment, the absence of ability to prove an enforceable contract may be so slight that it is inevitably unenforceable, such that it is an unenforceable contract that gives no interest in land: Becker Developments; Oxford Development Group Inc. et al., v. Midland Development Ltd., (January 14, 1993) [1993] A.J. No. 47 (QL), [1993] A.W.L.D. 162 (Alta. C.A. No. 13668); ; Ilnicki (Roman) v. Makowski (Marek), (May 24, 1995) [1995] A.J. No. 1473 (QL) (Alta. Q.B. No. 9403 23313). It may be that a trial is needed to reach the same outcome: Booth (George H.), et al. v. Knibb Developments Ltd. et al., (July 24, 2002) 312 A.R. 173, 281 W.A.C. 173, [2002] A.J. No. 957 (QL), 2002 CarswellAlta 951 (Alta. C.A. No. 00-19043; 2002 ABCA 180).

section can, in effect, supplement Section 152 of the *Land Titles Act* in order to preserve titles from being embarrassed by *lis pendens* which are, in fact to some extent, a straw man in relation to the attack upon the title.

[35] The reason I say that it is not necessary for me to deal with that particular point, though, is because I am satisfied that this is not a straw man situation.

[36] In my view, the *lis pendens* is not only substantiated by the condominium fees amount which is specified by the Statement of Claim, but by at least some arguability that in fact there has been damage – injury in a sense – applicable to the usage or misusage of the common property including the common property meeting room and the laundry room which were a subject matter of some dispute[13].

[37] Even though those misuses only perhaps elevate the claim to something short of $14,000.00, there is the further feature, as I mentioned before, of the question of whether or not the sale of the parking stalls involved some form of carried forward interest in land that is subject to attack under the *lis pendens* under Section 148(1) of the *Land Titles Act*.

[38] The decision that I referred to earlier relative to ***Carrington*** does not actually address this particular point specifically. It does not clarify whether or not the remedy that the Court of Appeal might be disposed to grant would allow some form of steps to be taken in that particular respect.

[39] I would also be concerned that, in fact, there is some merit in the argument made by counsel for the numbered company and Mr. Dueck that once the land is completely out of the hands of the party against whom the *lis pendens* is really being brought, that third parties, thereby recipients of the land, should somehow be prejudiced in that particular respect.

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[13] Case law as to caveats discusses the legal of arguability needed to support the caveat as an interest in land: see e.g. Barrie (Dale R.), et al., v. Villeneuve Sand & Gravel Ltd., (October 28, 1999) 28 R.P.R. (3rd) 239, 74 Alta. L.R. (3rd) 241, 252 A.R. 324, [1999] A.J. No. 1218 (QL), 1999 CarswellAlta 978 (Alta. Q.B. No. 9903-09634; 1999 ABQB 799; Johnstone J.), from (July 16, 1999) [1999] A.J. No. 859 (QL), 1999 CarswellAlta 1405 (*idem*, Funduk M.C.); Acquest / Alberta Mining Inc., v. Barry Developments Inc., (June 30, 1999) 241 A.R. 1, 73 Alta. L.R. (3rd) 252, 29 R.P.R. (3rd) 18, [2000] 2 W.W.R. 543, [1999] A.J. No. 784 (QL), 1999 CarswellAlta 1065 (Alta. Q.B. No. 9901-09331; 1999 ABQB 511; Hutchinson J.), additional reasons at (November 10, 1999) 254 A.R. 357, [2000] 2 W.W.R. 571, 29 R.P.R. (3rd) 46, 73 Alta. L.R. (3rd) 280, [1999] A.J. No. 1313 (QL), 1999 CarswellAlta 1062 (Alta. Q.B. No. 9901-09331; Hutchinson J.).

[40] I am confident, however, that the Courts would, in exercise of any jurisdiction they may have under Section 190(1) of the *Land Titles Act*, would fix that situation and prevent any further prejudice from occurring to third parties related to it.

[41] That is not the situation we have right now, though. What we have is a situation where the numbered company and Mr. Dueck are still the owners of the land and are still the persons who are said to be subject to the lawsuit and the lawsuit is sufficiently in amount, it seems to me, to support the existence and continued existence of *lis pendens* under these particular circumstances.

[42] I have no evidence in affidavit form or otherwise in front of me to suggest that somehow the numbered company and/or Mr. Dueck will be caused to suffer economic loss of any manner which is more significant than that which ordinarily attends the conduct of litigation in this jurisdiction.

[43] In that respect, therefore, I would say that the application to discharge the certificate of *lis pendens* as brought by the numbered company and by Mr. Dueck is dismissed.

5. Motion as to the Civil Enforcement Act

[44] Turning to Section 17 of the *Civil Enforcement Act* – although as I said before this may be something of a moot point – it seems to me that that particular section can also be invoked on behalf of the Condominium Corporation.

[45] In this particular regard, I note that the Section provides that there should be some resistance on the part of the Courts to prejudgment execution by the manner in which it is worded.

[46] The judicial abhorrence for prejudgement execution has been expressed by other judges of this Court[14] and by myself in other contexts, but the statute speaks for itself in terms of that

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[14] Rea (John Patrick) v. Patmore (Larry) et al., (October 8, 1999) [1999] A.J. No. 1168 (QL), 1999 CarswellAlta 1438 (Alta. Q.B. No. 9303-19499; 1999 ABQB 759; Veit J.), at para. 4, para. 18 as amended; First Mortgage Alberta Fund (VI) Inc., et al., v. Boychuk (Diane) et al., (March 5, 2003) 336 A.R. 319, 44 C.B.R. (4th) 64, [2003] A.J. No. 713 (QL), 2003 CarswellAlta 878 (Alta. Q.B. No. 0001-15543; 2003 ABQB 217; Romaine J.), at paras. 14 and 15; Feigelman (Joel Jerome) et al. v. Aetna Financial Services Ltd., (January 31, 1985) [1985] 1 S.C.R. 2, 56 N.R. 241, 32 Man.R. (2nd) 241, 55 C.B.R. (N.S.) 1, 29 B.L.R. 5, [1985] 2 W.W.R. 97, 15 D.L.R. (4th) 161, 4 C.P.R. (3rd) 145, [1985] S.C.J. No. 1 (QL) (S.C.C. No. 17479), at pp. 12 to 14 of [1985] 1 S.C.R.

particular issue[15]. Section 17 of the *Civil Enforcement Act* provides that an attachment order may be granted even as against land where:

> (a) there is a reasonable likelihood that the Claimant's claim against the Defendant will be established, and
>
> (b) there are reasonable grounds for believing that the Defendant is dealing with the Defendant's exigible property or is likely to deal with that property,
>
> > (i) otherwise than for the purpose of meeting the Defendant's reasonable and ordinary business or living expenses, and
> >
> > (ii) in a manner that would be likely to seriously hinder the Claimant in the enforcement of a judgment against the Defendant.

[47] In relation to Section 17(a) of the *Civil Enforcement Act*, I am satisfied that, in fact, the nature of the claim reaches the level of reasonable likelihood for the purposes of that section.

[48] It seems to me that – based on the decision in ***Carrington*** – a substantial body of this particular claim is a slam-dunk as far the Condominium Corporation is concerned and that the resistance on the part of the numbered company and Mr. Dueck is going to have to be sorted out in some way or another fairly soon unless they wish to go to trial on the particular point.

[49] Nevertheless, I am well satisfied that under Section 17(a) there is reasonable likelihood that, in fact, the Condominium Corporation's claim as against the Defendant in this lawsuit will be established.

[50] As far as Section 17(b) of the *Act* is concerned, the Defendant's Counsel – that is to say counsel for the numbered company and Mr. Dueck – made a formidable (and I have to say persuasive) argument that the Court should not be drawn into suggestions or suspicions or inferences as to any sort of *mala fides* or deliberate pattern of misconduct on the part of Mr. Dueck and the numbered company for the purposes of applying that particular subsection (b) of Section 17 of the *Civil Enforcement Act.*

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[15] See First Mortgage Alberta Fund (VI) Inc., et al., v. Boychuk (Diane) et al., at para. 16; Alberta Treasury Branches v. Pocklington (Peter Hugh) et al., (October 13, 1998) 231 A.R. 84, 68 Alta. L.R. (3rd) 52, [1998] A.J. No. 1091 (QL) 1998 CarswellAlta 918 (Alta. Q.B. No. 9803-14944; 9803-14940; 9803-14381; Bielby J.); and Osman Auction Inc., v. Belland (Guy) et al., (November 30, 1998) 235 A.R. 180, [1998] A.J. No. 1307 (QL), 1998 CarswellAlta 1376 (Alta. Q.B. No. 9803-19633; 1998 ABQB 964; Burrows J.), at paras. 39 to 44.

[51] I do, however, say that the question of whether or not there is some ill intent on the part of Mr. Dueck and the numbered company is really rather beside the point. The question really to be determined under that Section is whether there are reasonable grounds for believing that the Defendant is or is likely to deal with the Defendant's exigible property in a manner which is likely to seriously hinder the Claimant and otherwise then for the purpose of reasonable and ordinary business expenses.

[52] In relation to this particular point, I emphasize that the term in the statute is "exigible property" not the *particular* property which happens to be the subject matter of the case. Nevertheless, it is clear from the affidavit evidence which has been put before me that, in fact, the only property that the company, 775601 Alberta Ltd., has in Alberta at the present time is this particular subject matter, Unit 55, plus perhaps some small assets somewhere else that are not particularly or clearly identifiable.

[53] In that particular respect, it seems to me that that is the "exigible property" – which is the subject matter of this particular application and which the interest of the Condominium Corporation is inveighed against.

[54] Insofar as the question of whether that exigible property is likely to be dealt with in a manner other than meeting the Defendant's reasonable or ordinary business or living expenses, there is no evidence before me at all that, in fact, the Defendant would do anything other than sell it, or somehow charge or encumber that particular property for the purposes of acquiring revenue.

[55] This is not a situation where there is any reason for me to think – and I am satisfied on the balance of probabilities that there is no reason to think that the Defendant would use the proceeds of that particular property for reasonable and ordinary business or living expenses, referring to the numbered company, 775601 Alberta Ltd.

[56] 775601 Alberta Ltd., according to the affidavit material, has no other business and is not a person with living expenses in any event for the purposes of this matter. Consequently, it seems to me that the "otherwise" aspect of that matter does not exempt the land from being tied up under Section 17 of the *Civil Enforcement Act.*

[57] Subsection (ii) of Section 17(b) is perhaps the most complicated one from the point of the view of the application made on behalf of the Condominium Corporation. In that instance, the Condominium Corporation has the burden of establishing that it would be likely to seriously hinder the Claimant in the enforcement of a judgment against the Defendant and that the dealing with the property by the numbered company and Mr. Dueck would be such as to achieve that serious hindrance.

[58] In relation to this particular matter, it does seem to me that I should look at this matter in the larger context of the evidence which is placed before me.

[59] We have the situation where this particular company is described as basically the operator of this particular Dunluce Village investment. The Dunluce Village investment has been gradually disposed of by the numbered company, over time, to various unit holders. They are now down to the one unit that is left.

[60] There is a history, however, indicated that the operators of the numbered company, 775601 Alberta Ltd., and Mr. Dueck were under the impression, at least, that the laundry room and meeting room could be taken by them for the purposes of helping them sell Unit 55.

[61] This impression was incorrect and could not be justified under a proper or reasonable interpretation of the *Condominium Property Act*. Likewise, the same operators had the opinion that they were able to sell off the common property parking stalls to individuals as well; another error in interpretation of the *Condominium Property Act*, and as mentioned before in relation to the ***Carrington*** case, an alleged breach of trust under those circumstances.

[62] We have the confirmation of the limited degree of assets that exist in this instance. It seems to me that in all of the circumstances, it would be reasonable to infer – setting aside *mala fide* – that the numbered company, 775601 Alberta Ltd., would, in fact, disappear in a legal sense, not necessarily in a running-away sense, if Unit 55 were, in fact, to be sold[16].

[63] The onus would then have to collapse upon the Condominium Corporation to find out what happened to the proceeds of the sale of Unit 55 and attempt to recover from it in some way or another.

[64] Accordingly, I am of the opinion that, in fact, an order should go pursuant to Section 17 of the *Civil Enforcement Act*, putting some form of security against the title to that particular property in replacement of the *lis pendens* if necessary, in order to ensure that, in fact, the Plaintiff Condominium Corporation was able to recover its damages from the sale of that particular unit in the fullness of time.

[65] It may be, however, that the Condominium Corporation will not seek to draft an order to that effect in light of what has happened relative to the *lis pendens*, but I will maintain jurisdiction of the matter for the purposes of ensuring that that can be done if it is seen necessary or if there is a trade off accomplished in relation to this particular matter.

[66] It may well be that the offer that may be forthcoming from the Condominium Corporation is that 775601 Alberta Ltd. and Mr. Dueck put up, in court, sufficient funds to cover

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[16] I would therefore distinguish Industrial Rewind & Supply Inc. v. Kuntz & Kramer Services Inc., et al., (February 20, 2001) 11 C.P.C. (5th) 76, [2001] A.J. No. 201 (QL) 2001 CarswellAlta. 231 (Alta. Q.B. Nos. 9803-18210; 9903-03137; 9903-11848; 2001 ABQB 123; Acton J.), notably at paras. 7 and 8, at pp. 78 to 79 of (2001) 11 C.P.C. (5th).

the claims made by the Condominium Corporation at which point the *lis pendens* could disappear and any remedy under Section 17 of the *Civil Enforcement Act* would not be pursued and everybody could part company and they could fight over the money in the fullness of time.

[67] In any event, the application, therefore, would be granted if requested formally at some future time in specific terms by the condominium corporation pursuant to Section 17 of the *Civil Enforcement Act* for such relief as is appropriate to ensure their coverage.

6. Conclusion

[68] [In the result, the application of the Defendants in Action No. 0303-15693 and the Applicants in Action No. 0403-08428, namely 775601 Alberta Ltd. and Doug Dueck, to have the *lis pendens* removed from the relevant title to the property was dismissed. The application of the Plaintiff in Action No. 0303-15693 and the Respondent in Action No. 0403-08428, namely The Owners: Condominium Plan No. 822 1011, for a remedy under Section 17 of the Civil Enforcement Act was granted with the terms, if necessary, to be worked out. After submissions of Counsel, it was directed that the costs of the motions would be in the cause.]

Heard and delivered orally on the 3rd day of August, 2004.
Dated at the City of Edmonton, Alberta this 23rd day of September, 2004.

Jack Watson
J.C.Q.B.A.

Appearances:

Colleen G. Dunlop
Bishop & McKenzie LLP
2500 Bell Tower
10104 - 103 Avenue
Edmonton, Alberta T5J 1V3
for the Plaintiff/Respondent

Paul V. Stocco
Brownlee LLP
2200 Commerce Place
10155 - 102 Street
Edmonton, Alberta T5J 4G8
for the Defendants/Applicants