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COURT OF APPEAL FOR ONTARIO

RE: **YORK REGION VACANT LAND CONDOMINIUM CORPORATION NO. 968 and YORK REGION VACANT LAND CONDOMINIUM CORPORATION NO. 1002, Applicants (Respondents in Appeal) – and - SCHICKEDANZ BROS. LIMITED and YORK REGION COMMON ELEMENT CONDOMINIUM CORPORATION NO. 967, Respondents (Appellants in Appeal)**

BEFORE: **McMURTRY C.J.O.; BLAIR J.A. and CUNNINGHAM A.C.J.S.C. (ad hoc)**

COUNSEL: **Jonathan H. Fine, for the applicants(s) (respondents in appeal)**

Irving Marks, Shawn Pulver, for the respondent(s) (appellants in appeal)

HEARD: **Monday, September 18, 2006**

On appeal from the order of Mr. Justice E. Loukidelis dated December 15, 2005 made in Newmarket, Ontario.

ENDORSEMENT

[1] Schickedanz Bros. Limited ("Schickedanz") and York Region Common Element Condominium Corporation No. 967 ("YRCECC") appeal the decision of Loukidelis J. dated December 15, 2005 asking that his order be set aside.

[2] The respondents herein sought a declaration before Loukidelis J. that the conduct of Schickedanz, in registering a declaration in February 2002, was oppressive, unfairly prejudicial to the respondents, and entirely disregarded their interests. The impugned

declaration created a Common Elements Condominium Corporation ("CECC") which is a type of condominium corporation authorized by the *Condominium Act* ("the Act"). A CECC contains common elements, but no units. Rather, parcels of land are "tied" to the CECC and these parcels are called "Potls" which are responsible for the common expenses related to the CECC. In the present case, the CECC was created in order to facilitate the maintenance and management of the ring road within the development.

[3] Essentially, Schickedanz did not want the undeveloped Potls to contribute to common expenses related to the CECC because these were vacant parcels and hence there was no reason for them to contribute to the maintenance of a ring road they were not using. The result was the declaration creating a bifurcated expense formula which had the effect of saddling the developed phase with over 75% of the common expenses in 2002-03 and over 48% of the expenses thereafter. Phase 2, when it was registered, would have to pay approximately 34% of the expenses and it was the two vacant land condominium corporations (VLCC's) who objected to this disproportionate sharing of expenses and who commenced the application before Loukidelis J.

[4] It is important to note that the bifurcated expense formula outlined in the declaration was disclosed to all prospective purchasers of units in the two respondent corporations. Non-disclosure is not the issue for the respondents herein, but rather that the bifurcated formula set out in the declaration was contrary to the Act.

[5] There are three issues before us. First, are the disputed sections of the declaration inconsistent with the Act? Second, did Schickedanz act in a manner oppressive or unfairly prejudicial to the respondents? And, third, if the appeal were to be dismissed on the first two issues, should Schickedanz be given credit for payments it made to YRCECC No. 967 while it owned units of the respondents?

[6] In our view, the application judge erred in his interpretation of the requirements mandated by the Act, which requires the declaration to set out the proportionate contribution of each Potl to the common expenses. We conclude that the appellants' declaration clearly did so and the provision in the Act prohibiting an owner from being exempt from its common expense obligations is irrelevant as the obligations are determined by the terms found in the declaration. We conclude there is no conflict between the declaration and the Act and therefore the formula ought to stand. The proper time for unit holders of the VLCC's to complain about the common expense formula would be at the time they were presented with the declaration. The Act provides purchasers with a ten-day window in which to rescind any offer to purchase granting purchasers a period of time to consider the terms and determine whether or not they think they are fair. If purchasers disagreed with the bifurcated formula set out in the declaration, they were free within that window of opportunity to walk away and rescind their offer.

[7] Without question, the Act is to prevail over the declaration in situations where the declaration conflicts with the Act. In such a case, an impugned declaration would be void. In the present case, however, we cannot see how the impugned sections of the declaration in any way conflict with the Act. Section 84(1) of the Act states,

> 84.(1) Subject to the other provisions of this Act, the owners shall contribute to the common expenses in the proportions specified in the declaration.

[8] Section 84(3) states,

> 84.(3) An owner is not exempt from the obligation to contribute to the common expenses even if,
>
> (a) the owner has waived or abandoned the right to use the common elements or part of them;
>
> (b) the owner is making a claim against the corporation; or
>
> (c) the declaration, by-laws or rules restrict the owner from using the common elements or part of them.

[9] The purpose of the latter subsection is not to prevent a 0% allocation in the declaration, but rather to prevent a unit owner or a Potl owner in the context of a CECC from resiling from his or her obligation to contribute to common expenses as apportioned by the declaration. We recognize, as did the Court in *York Region Condominium Corp. No. 771 v. Year Full Investment (Canada) Inc.*, [1993] O.J. no. 769 [Q.L.] (O.C.A.) 5, that non-usage is not a reason for non-payment of common expenses. However, in the present case, it is not the appellants' non-usage of the common element (the ring road) that is the source of their refusal to contribute, but rather the absence of any obligation pursuant to the declaration. Clearly, the appellants set up the bifurcated formula so that only users of the ring road should pay for its upkeep. That was clearly spelled out in the declaration, which was fully disclosed to purchasers.

[10] As to the second issue, we recognize that the bifurcated formula clearly favoured the interests of Schickedanz at the expense of the unit holders, but in our view, it does not necessarily follow that this conduct was either oppressive or highly prejudicial. This formula was created before the unit holders purchased their property and since the impugned provisions of the declaration do not violate the Act, there can be no grounds for finding that Schickedanz acted oppressively. We recognize that in *Mckinstry v. York Condominium Corp. 472,* (2003), 68 O.R. (3d) 557 9 (O.S.C.J.), Jurianz J. (as he then was) noted that the oppression remedy could be used to protect stakeholders from unlawful conduct, as well as from conduct that, while technically legal, could be

oppressive. That is not the situation here. The appellants fully complied with s. 84 of the Act by collecting, pursuant to the declaration, the common expenses owed by the Polts. Just as in *Peel Condominium Corp. No. 417 v. Tedley Homes* [1997] Carswell No. 2998 (O.C.A.), the allocation of common expenses in this case by Schickedanz was not for a devious purpose, but rather for a reasonable and legitimate business purpose which related to the staged nature of this development.

[11] One final word. In *Abdool v. Somerset Place Developments of Georgetown Ltd.*, [1992] Carswell No. 620 (O.C.A.) this court, in interpreting s. 52 of the Act, held,

> While I may generally agree with the learned judge's critique of legislation, I am unable to accept his approach to the current disclosure statements. In my respectful opinion, this approach fails to construe s. 52 in a manner that properly balances consumer protection and the commercial realities of the condominium industry and, if adopted, would require a disclosure document incompatible with the underlying aim of the section.

[12] In our view, s. 7(2)(c) and (d) of the Act and s. 40(6)(c) and (d) of the regulations ought to be interpreted in light of the commercial realities of the condominium industry. As noted, in this case, each purchaser in this development had the option of deciding whether or not to purchase based upon the terms disclosed in the declaration. It is not oppressive for a developer declarant to register and implement a properly disclosed declaration so long as it is in compliance with the Act and its regulations. If declarants could not rely upon the terms of a declaration which fully complied with the Act and was fully disclosed to purchasers, there would be shocking implications for the industry.

[13] Because we allow this appeal in respect of the first two grounds, it is unnecessary for us to deal with the issue of payment credits.

[14] Accordingly, the appeal is allowed with costs, which we fix at $14,000 all inclusive.

"R. Roy McMurtry C.J.O."

"Blair J.A."

"Cunningham A.C.J.S.C."