IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

	)	***R. L. Tapper, Q.C.*** *and*
	)	***K. M. Coutts***
WINNIPEG CONDOMINIUM CORPORATION 479	)	*for the Appellants*
	)	
	)	***T. A. McMahon***
	)	*for the Respondent*
(Applicant) Respondent	)	
	)	***J. King***
- and -	)	*for the Proposed Intervener*
	)	*Thomas Gordon Frohlinger*
520 PORTAGE AVENUE LTD. and HART MALLIN	)	
	)	*Chambers motion heard:*
	)	***July 18, 2019***
	)	
(Respondents) Appellants	)	*Decision pronounced:*
	)	***August 8, 2019***

CAMERON JA

[1] This is a motion to extend time to file and, if granted, a motion by Thomas Gordon Frohlinger (Mr. Frohlinger) to intervene in an appeal by the respondents 520 Portage Avenue Ltd. and Hart Mallin, its principal (collectively, the developer), of an order transferring title of a parking unit in a condominium building located at 520 Portage Avenue (the parking unit) to the applicant Winnipeg Condominium Corporation 479 (the condominium corporation). Mr. Frohlinger's motion to intervene is grounded in the fact that he is the mortgagee of three mortgages registered against the parking unit.

Background

[2] The condominium building consists of a number of residential and commercial units. It also includes the parking unit that is at issue in these proceedings. The parking unit is inside the condominium building and is comprised of seven stalls for use by the residential unit owners (the owners). When the individual residential units were sold, the developer retained ownership of the parking unit, leased it to the condominium corporation (the parking lease) and provided the condominium corporation with an option to purchase it. The condominium corporation leased the parking stalls to the owners. It did not exercise the option to purchase. Later, the developer terminated the parking lease. Various rental arrangements for the parking stalls have been made between the owners and the developer. The funds received from these arrangements are currently being held in trust pending the outcome of this litigation.

[3] Mr. Frohlinger was counsel to the developer during the development of the condominium building. As well, in his personal capacity, he assumed two mortgages from an individual who originally loaned money to the developer. In addition, he registered a third mortgage as security for funds that he had advanced to the developer as a minority investor and as security for unpaid legal fees. In total, Mr. Frohlinger has three mortgages registered against the parking unit. He estimates that the aggregate amounts outstanding on his mortgages is in excess of $400,000.

[4] Based in large part on an alleged failure by the developer to disclose to the owners the fact that it retained ownership of the parking unit, the owners filed a statement of claim seeking a declaration that the parking unit was a

common element of the condominium corporation. They asked that ownership of the parking unit be transferred to the condominium corporation. Later, the condominium corporation filed a notice of application requesting the same relief and, in addition, requested that the parking lease be annulled.

[5] The developer brought a motion asserting that the litigation should not proceed by application, but rather should proceed by way of trial.

[6] The application judge denied the developer's motion. He found that there was no substantial dispute of fact and that he had sufficient evidence to decide the matter by way of application. He held that a consideration of the condominium declaration and plan would lead a reasonable purchaser to assume that the parking unit was a common element of the condominium property. He found that the developer breached its fiduciary duty by failing to disclose to the owners the fact that it owned the parking unit. He declared the parking unit to be a common asset of the condominium corporation and granted an order transferring the parking unit to the condominium corporation. He stated that an ancillary effect of the declaration was that the parking lease between the developer and the condominium corporation was null and void as it was contrary to the condominium declaration.

[7] The developer filed a notice of appeal on April 11, 2019. It also filed a motion before the application judge asking that he stay his decision pending the appeal. In support of its motion for a stay, the developer filed an affidavit sworn by Mr. Frohlinger outlining his interests. The application judge denied the developer's motion for a stay on July 2, 2019.

[8] Pursuant to r 46.1(2) of the Manitoba, *Court of Appeal Rules*, Man Reg 555/88R, Mr. Frohlinger had 30 days from the filing of the notice of

appeal to apply for intervener status. He did not file within that timeframe. He chose to wait until after the application judge gave his ruling regarding the stay. Thus, he filed his motion for an extension of time and intervener status on July 5, 2019.

[9] The condominium corporation opposes, and the developer did not participate in, the motion which is currently under consideration.

Positions of the Parties

[10] In support of his motion, Mr. Frohlinger claims that while he was aware of the application made by the condominium corporation in general, he was never formally served with it. He states that the transfer adversely affects him as it may extinguish his interest as mortgagee of the three mortgages. He explained that he intends to argue that even if the title of the property transferred, the transfer must include the encumbrance or otherwise account for it. In his view, you cannot transfer unencumbered title if you do not have it. Mr. Frohlinger acknowledges that one of the grounds of appeal is that the application judge erred in ordering the transfer of the parking unit without accounting for the existing mortgages. However, he argues that his perspective as an encumbrancer is different than that of the registered owner.

[11] The condominium corporation asserts that Mr. Frohlinger has not provided any explanation for his delay in attempting to become involved in the proceedings. It opposes the motion for leave to extend time and to intervene on the basis that Mr. Frohlinger had constructive notice of the proceedings since they were initiated. It notes that he was counsel to the developer at the time the action was initiated by the owners and continued to

be counsel until just after having been served with the application made by the condominium corporation.

[12] Regarding intervention specifically, the condominium corporation has many concerns, including that Mr. Frohlinger was involved in drafting the condominium declaration that is in question in the appeal. It further submits that the issue as to what was to happen with the mortgages was not argued at the application. In its view, the developer's ground of appeal dealing with that issue constitutes a new issue on appeal. It submits that it has already filed its factum in the appeal and that it would be unable to respond in writing to the arguments raised by Mr. Frohlinger.

[13] In the condominium corporation's view, the parking unit was not the developers to mortgage. Alternatively, it argues that, even if the mortgages were to continue to encumber title to the parking unit, how that should be dealt with is a matter for a future accounting between the parties.

[14] Finally, the condominium corporation submits that Mr. Frohlinger has not demonstrated that his submissions would be useful to the Court or different from the other parties.

[15] While I have sympathy with the positions taken by the condominium corporation, I have been persuaded to extend the time for the motion for leave to intervene and would allow Mr. Frohlinger to intervene, on a limited basis, for the reasons that follow.

Analysis and Decision—Extension of Time

[16] The ability of the Court to order an extension of time is provided by r 42 of the *Court of Appeal Rules*. Consideration of a request for an extension of time involves three main criteria: (i) a continuous intention to complete the application or appeal from a time before the expiration of the filing period; (ii) a reasonable explanation for the delay; and (iii) arguable grounds. See *Bohemier v Bohemier*, 2001 MBCA 161 at para 2 (extension of time to file an appeal); and *Lughas v Manitoba Public Insurance Corp*, 2014 MBCA 63 at para 3 (extension of time to file application for leave to appeal).

[17] In addition, the Court has an overriding discretion to grant or refuse an extension if it is right and just in the circumstances (see *Singh v Pierpont*, 2015 MBCA 18 at para 41 (extension of time to file a factum)). Inadvertence of counsel is an accepted explanation (*ibid*).

[18] In this case, while Mr. Frohlinger did not make a motion to intervene within 30 days of the filing of the appeal, he did indicate his interest in the matter by swearing an affidavit in the motion for a stay before the application judge. In addition, he filed his motion to extend time and to intervene only a few days after the application judge denied the developer's motion for a stay. Regarding his explanation for not filing the motion to intervene earlier, he stated that throughout the application proceedings, he expected that his status as a secured creditor would be respected. He argues that it is not normally necessary for a secured creditor in a situation such as this to have to apply to intervene. While not ideal, I am of the view that these explanations are sufficient.

[19] In addition, prior to hearing argument on this motion, the developer and the condominium corporation indicated that they had reached an agreement regarding staying the enforcement of the application judge's order with certain conditions pending the outcome of this appeal. Despite being aware that a stay was now to be in place, Mr. Frohlinger continued with his motion. In my view, such action also constitutes evidence of his continued intent. Thus, I would grant the extension of time for him to file the motion to intervene to July 5, 2019, the date when he filed all of his materials regarding his motion.

Analysis and Decision—Motion to Intervene

[20] Regarding his motion to intervene, r 46.1(3) of the *Court of Appeal Rules* indicates that a motion for intervention must briefly: a) describe the intervener and the intervener's interest in the appeal; b) identify the position to be taken; and c) set out the submissions to be advanced, their relevancy to the appeal and the reasons why the submissions will be useful to the Court and different from those of the other parties.

[21] The factors to be considered in requests to intervene (especially those made by public interest groups) are:

(i) the nature of the case;

(ii) the issues which arise; and

(iii) the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

See *Sawatzky v Riverview Health Centre Inc*, 1998 CarswellMan 570 at para 36 (QB); *R v Creekside Hideaway Motel Ltd; R v Jenkinson*, 2007 MBCA 19 at para 18; and *R v Mabior (CL)*, 2009 MBCA 93 at paras 5-7.

[22] In this case, I am persuaded that Mr. Frohlinger has a sufficient financial interest in the outcome of the appeal. The submission that he states that he will make is that it was an error for the application judge to have made the order transferring the title to the condominium corporation without considering the mortgages or his position as a mortgagee. While the developer has advanced this ground of appeal, I accept that Mr. Frohlinger's perspective as a secured creditor is different from that of the developer. He intends to argue that, based in real property law, it would have been impossible for the application judge to have transferred the title unencumbered. I have reviewed the briefs of the parties filed in the appeal. Neither address the real property argument in the manner advanced by Mr. Frohlinger.

[23] Therefore, I would grant Mr. Frohlinger's motion to intervene only to the extent that he will argue the developer's ground of appeal asserting that the application judge "erred in law in ordering that the Parking Unit be transferred to [the condominium corporation] without accounting for existing mortgages registered against the Parking Unit".

[24] Mr. Frohlinger shall not be entitled to raise new grounds of appeal, or to adduce further evidence, or otherwise to supplement the record of the parties. He is allowed to file a factum not exceeding 10 pages by no later than September 13, 2019. The panel who hears the appeal shall determine whether he will be allowed to present oral argument at the appeal.

[25] As to the concern that the condominium corporation would be unable to answer the arguments to be advanced by Mr. Frohlinger, I would order that it be allowed to file a written response to his factum not exceeding 10 pages by no later than October 15, 2019. The developer has not participated in this motion and will not be permitted to file further written materials without the consent of this Court.

[26] Regarding the argument that the issue of the mortgages was not raised at the application, whether or not to hear the argument is a matter to be determined by a panel of this Court. In the event that the panel decides that it will not hear argument on this ground of appeal, any prejudice to the condominium corporation can be dealt with by an order of costs.

[27] I would order costs for this motion to be determined in the appeal.

Cameron JA