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(Winnipeg Centre)
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Cited as: 2020 MBQB 176

# COURT OF QUEEN'S BENCH OF MANITOBA

IN THE MATTER OF: ***The Condominium Act***, C.C.S.M. c. C170

**B E T W E E N:**

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| BRANDON CONDOMINIUM CORPORATION NO. 68, | ) | Counsel: |
| | ) | R. IVAN HOLLOWAY |
| applicant, | ) | for the applicant |
| - and - | ) | JAMIE A. KAGAN |
| | ) | for the respondent |
| TJR INVESTMENT HOLDINGS LTD., | ) | |
| | ) | JUDGMENT DELIVERED: |
| respondent. | ) | DECEMBER 9, 2020 |

## KEYSER J.

[1] The applicant, Brandon Condominium Corporation No. 68 ("BCC"), has applied for relief as against TJR Investment Holdings Ltd. ("TJR"), as follows:

(a) a declaration that certain provisions in the Declaration of BCC (the "Declaration") are void;

(b) an order that the Declaration in the land titles office be amended, as well as unit titles and mortgage registrations, the cost of which should be borne by TJR;

(c) a declaration that TJR has engaged in improper conduct as defined by section 225(2) of ***The Condominium Act***, C.C.S.M. c. C170 (the "***Act***");

(d) an order for compensation with interest;

(e) punitive damages, as well as solicitor and client costs.

[2] Underlining this dispute is the obligation of the owners of the commercial units in a condominium development to contribute to the common expenses and to the reserve fund as well as the questions of their use of surface parking and the use of reserve account funds to purchase furniture. There is also a question of whether these issues are statute-barred.

[3] The condominium development in question is known as Renaissance Station and consists of 66 residential units mostly owned by different individuals and 10 commercial units owned by TJR. A corporation related to TJR, Wendot Limited ("Wendot"), owns 18 of the residential units. The Declaration in question was filed in the Brandon Land Titles Office on July 17, 2008 by a precursor corporation of TJR and is found at Exhibit "A" in the affidavit of Ronald Funk ("Funk"), affirmed February 8, 2019. Schedule "C" of the Declaration sets out the respective percentages for contribution to common expenses and to the reserve fund for each unit. Each of the residential units, including those owned by Wendot, contributes a named percentage to these costs while all of the commercial units are allotted zero percent of common expenses. This is more specifically set out in section 3 of the Declaration under the heading "Particulars of Units", as follows:

> The Units shall be shown on the Plan which has been prepared in accordance with the provisions of the Act and is submitted for registration contemporaneously herewith, and the proportions expressed in percentages allocated to each Unit in which the Owners are to have voting rights in the Corporation, to share in the Common Elements, and to contribute to the common expenses, and to contribute to the reserve fund

> or reserve funds of the Corporation, shall be listed on **Schedule "C"**, which is attached to and forms part of this Declaration.
>
> For clarity, it is acknowledged that the Owners of the Commercial Units have no voting rights, have no interest in the Common Elements, do not share in the Common Expenses, do not contribute to the Common Expenses, and do not contribute to the Reserve Fund or Reserve Funds of the Corporation.

[4] The affidavit of Tyler Rice ("Rice"), sworn May 9, 2019, sets out that Renaissance Station was specifically designed with the intention of keeping the commercial and residential units separate. As a result, aside from the commercial units themselves and the commercial parking area, the owners, tenants and customers of the commercial units do not have access to or use any other areas of the building or the common elements. In addition, the residential unit owners had disclosure of this zero allocation when the Declaration was filed in 2008.

[5] Notwithstanding this intention, BCC contends that this is unfair to the residential unit owners and has left the reserve fund significantly underfunded. In addition, BCC asserts that this zero allocation is completely contrary to provisions in the ***Act***.

[6] The ***Act*** was proclaimed in 2015 and specifically deals with declarations that were filed before the new legislation came into effect. Section 3(1) states:

> **Act prevails**
> 3(1) This Act applies despite any agreement to the contrary.

Further, section 14 states:

> **Act prevails over declaration**
> 14 If a declaration, including a declaration registered before February 1, 2015, conflicts with a provision of this Act, the provision of this Act prevails.

Thus, BCC's position is that it does not matter if residential unit owners were advised by virtue of the disclosure statement provided in 2008 that there was zero allocation to commercial unit owners. This was disallowed as of 2015.

[7] BCC alleges that this zero allocation to commercial units amounts to improper conduct that not only has led to the residential unit owners paying more than their fair share of the common elements, but also has contributed to the reserve fund being severely underfunded. Hence, this application.

[8] Section 225(1) of the ***Act*** states:

> **Order — improper conduct**
> 225(1) A unit owner, condominium corporation, buyer of a proposed unit, holder of a registered instrument in respect of a unit, declarant or owner-developer who reasonably believes that improper conduct has taken place may apply to the court for an order under this section.

"Improper conduct" is defined in section 225(2) of the ***Act***, as follows:

> **Meaning of "improper conduct"**
> 225(2) In this section, "**improper conduct**" means
>
> (a) the conduct of the condominium corporation's business affairs in a manner that is oppressive or unfairly prejudicial to the applicant or that unfairly disregards the applicant's interests;
>
> (b) the exercise of the board's power in a manner that is oppressive or unfairly prejudicial to the applicant or that unfairly disregards the applicant's interests; or
>
> (c) the conduct of the declarant or owner-developer with respect to the applicant or a purchaser or prospective purchaser in a manner that is oppressive or unfairly prejudicial or that unfairly disregards the interests of any of them.

BCC alleges that there has been ongoing improper and oppressive conduct by TJR.

[9] BCC submits that there are four issues to be determined, as follows:

1. Is the zero allocation, as set out in the BCC Declaration, allowable under the ***Act***?

2. Despite the residential units being responsible for all common elements, including surface parking, those spots have all been usurped by the commercial units.

3. Fifty thousand dollars ($50,000) was transferred from BCC's reserve account to TJR after December 2009 to purchase furniture for the recreation area. This was done, as referenced in minutes of the annual general meeting held December 17, 2009 (Exhibit "P" to the affidavit of Ronald Funk), even though sections 143(2) and (3) of the ***Act*** do not permit purchase of furniture from reserve funds.

4. Whether or not these issues are statute-barred.

## 1. Zero allocation issue

[10] BCC relies on section 36 of the ***Act*** as support for voiding the Declaration that was filed in 2008 and that purports to allow the commercial units to avoid contribution to any common expenses. Section 36(1) of the ***Act*** states as follows:

> **No separation**
> 36(1) The ownership of a unit may not be separated from the ownership of the share in the common elements.

Section 36(2) of the ***Act*** goes on to state:

> **Instrument of separation void**
> 36(2) Any instrument, agreement, document or transaction that purports to separate the ownership of a unit from its share in the common elements is void.

[11] Counsel both agree that there is no Manitoba authority interpreting section 36 of the ***Act***. However, there is case law from Ontario dealing with similar provisions. Not surprisingly, each side submits that the cases in question support

their interpretation. In ***Peel Condominium Corp. No. 417 v. Tedley Homes Ltd.*** (1997), 35 O.R. (3d) 257 ("***Tedley***"), the Ontario Court of Appeal dealt with six units in a condominium development that themselves were part of the common elements of the condominium and whose title would be transferred after the purchase price was paid. In that decision, the court held, at page 268:

> When the declaration was drawn it was understood that these suites would immediately form a part of the common elements of the condominium and that title would be transferred to the corporation after the purchase price had been paid. The zero allocation was made to accommodate that understanding and not for any devious purpose. ...

And further, at page 268:

> So long as the corporation remains the equitable owner of the suites and they continue to be used as common elements, the zero allocation is not inconsistent with the spirit and intent of the Act. ...

[12] BCC contends that the zero allocation was upheld in these very specific circumstances where the units themselves were common elements. As was stated in ***Tedley***, at pages 268-9:

> ... No purpose is to be served in not permitting this allocation to continue in effect. The motion judge's decision to divest the corporation of any interest in the suites and return their ownership to the developer was not sought in these proceedings. This form of relief is unsatisfactory to the corporation and the unit owners. They could not have anticipated that the six suites could conceivably be eliminated from this condominium as the application was framed. Given these circumstances, I think it preferable that the matter be disposed of on the basis that, should the suites revert to the developer in the future, the developer can at that time seek relief from the difficulties that may have been created by the manner in which the percentage allocations attributable to the suites were dealt with in the declaration. The issue can then be dealt with on proper notice to the unit owners and in the light of the circumstances then existing.

[13] TJR, however, contends that ***Tedley*** is authority for the proposition that zero allowances can be acceptable. When the BCC Declaration was filed in 2008 the equivalent section of the ***Act*** at that time read as follows:

> **Ownership not to be separated**
> 8(4) Except as provided by this Act, no share in the common elements shall be dealt with except with the unit of the owner; and any instrument dealing with a unit shall operate to deal with the share of the owner in the common elements without express reference thereto.

The position of TJR is that section 36 of our ***Act*** clearly refers to disallowing a further subdivision of common elements from already owned units. The position now being espoused by BCC was rejected far in advance of the new ***Act*** and had the Manitoba Legislature wanted to go in a different direction it could have specifically done so. TJR submits that a proper interpretation of section 36 means that a unit owner could not sell the unit and retain ownership of its share in the common elements. However, nothing in the 2008 Declaration of BCC separates ownership of the commercial units from their share in the common elements. It simply specifies that they have no share in the common elements.

[14] In ***York Region Vacant Land Condominium Corp. No. 968 v. Schickedanz Bros. Ltd.***, 2006 CanLII 32596 (ONCA) ("***Schickedanz***"), the condominium declaration set up a type of condominium corporation that contained common elements but no units. It was known as CECC – Common Elements Condominium Corporation. Certain parcels of land were tied to the corporation and were responsible for certain common expenses such as maintenance of a ring road. The court held:

> [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. ... 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.

[15] According to BCC, this case does not reference the Ontario equivalent of section 36. In addition, the court stated:

> [10] ... 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. ... 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.

[16] BCC contends that section 36 of our ***Act*** does not have a "devious purpose" qualifier, but that even in the absence of that there is no evidence as to the real purpose for the zero allocation. In fact, it contends that the BCC Declaration was drafted in a manner that was for a devious purpose since there was no reasonable business purpose for not requiring commercial unit owners to contribute to common element expenses. There are a number of common expenses that are the responsibility of the residential units, such as insurance, that cover the whole property. As well, the commercial units do not contribute to the reserve fund, which is seriously underfunded. BCC states that a number of reserve fund categories were identified in the Corporation's Reserve Fund Study and that apply to both residential and commercial units. As a result, allocations need not be

equal, but there is no reason for no contributions to be required by the commercial units.

[17] TJR on the other hand relies on ***Schickedanz*** for the acknowledgment that some of these allocations may cause hardship but that is acceptable unless done for a devious purpose. TJR's position is that both ***Tedley*** and ***Schickedanz*** predate the new ***Act*** in Manitoba and a different approach for Manitoba could have easily been set out in the ***Act*** if preferred. Further, in this specific case, TJR has set out why the zero allocation is supported (paragraph 35 of the affidavit of Rice), as follows:

> 35. The separation between the commercial units and the residential units was accomplished in a number of ways:
>
> (a) No entrances are shared between the commercial units and the residential units. The commercial units are accessible from the street-level entrances. The commercial units do not have access to or use the shared interior space of the building;
>
> (b) The residential units have access to a number of interior common areas and amenities which are not accessible to or used by the commercial units in any way. These include:
>
> (i) Residential hallways. ...;
>
> (ii) Fitness Room. ...;
>
> (iii) Elevators. ...;
>
> (iv) Residential Entrances. ...;
>
> (v) Common Room. ...:
>
> . . .
>
> (vi) Interior Stairwells. ...;
>
> (vii) Parkade. ...;

(c) Garbage is handled separately as between the commercial and residential units. The residential units have a private garbage chute and refuse bins. The commercial units have an exterior commercial bin system that they pay for separately. While the commercial units have no access to the residential garbage bins, the residential unit owners do have use of the commercial bins to dispose of large items.

(d) The residential units and the commercial units have completely separate electrical systems. Each of the commercial units has its own hydro meter and is responsible for paying its own hydro bill.

(e) The residential units and the commercial units have completely separate HVAC systems. The residential units are serviced by a HVAC unit located on the roof of the building, and the commercial units are serviced by a separate unit located on the ground floor.

(f) The commercial units pay their own property taxes as assessed by the City of Brandon.

Rice went on in his affidavit to set out a number of common expenses incurred by the residential unit owners that are completely unrelated to the commercial units. These include:

(i) The cost of daily cleaning of hallways, the residential entry ways, and the common room, which are not accessible to the commercial units;

(ii) The cost of cleaning the parkade, which is not accessible to the commercial units;

(iii) Service and maintenance of elevators, which are not accessible to the commercial units; and

(iv) The cost of interior heating and lighting for spaces such as hallways and the parkade, which are not accessible to the commercial units.

And finally, the commercial unit owners pay for a number of expenses that are not shared with the residential unit owners. For example:

(i) The commercial unit owners have paid all of the costs associated with the exterior development of the main floor of Renaissance Station;

(ii) The commercial unit owners have paid all of the costs of exterior landscaping for Renaissance Station;

(iii) The commercial unit owners have paid for the paving of the back lane which provides access to the parkade and building for residential unit owners.

(iv) The commercial unit owners have paid all costs associated with the additional street level parking lots, including paving gravel, electrical systems for vehicle plugs, street lighting, fencing, and landscaping. There was no surface parking available to the residential unit owners until RSI [Renaissance Station Inc.] purchased and developed this additional land after construction of Renaissance Station was completed;

(v) All of the mechanical systems for the building, including plumbing, sprinklers, gas, and electrical, pass through the commercial units' interior space. The commercial unit owners bear all of the costs associated with these mechanical openings such as the fire rating of pipes and mechanical systems;

(vi) The commercial unit owners pay all of the costs associated with the approximately 30 exterior street-level entrances to the commercial units.

Rice noted certain joint expenses that are paid by both the residential unit owners and the commercial unit owners. For example:

(i) there is only one water meter for Renaissance Station, and the commercial unit owners pay 20% of this cost;

(ii) the building insurance – the commercial unit owners pay 20% of this cost;

(iii) snow clearing for the back lane access to the underground parkade – the commercial unit owners pay 80% of this cost.

[18] In effect, Rice has deposed that there are valid and reasonable explanations for why the commercial unit owners do not contribute to the named common

expenses. As well, TJR is not represented on the BCC board and thus has no decision-making power.

[19] In my view, the position put forward by TJR is persuasive. I read section 36 of the ***Act*** not as disallowing zero allocation, but as not allowing a condominium unit owner to sell off his or her share in the common interests. Additionally, an explanation as to the reasonable purpose for the zero allocation was provided by Rice in his affidavit. He was not cross-examined on this. Finally, it must be stressed that the unit owners were provided with the Declaration back in 2008, which clearly sets out the respective allocations and common area expenses. The affidavit of Funk acknowledges that the Declaration was provided and none of the residential unit owners have deposed that they did not receive this. Both parties agree that the BCC Declaration must be in conformity with the new ***Act*** passed in 2015, regardless of whether or not there was disclosure. However, with disclosure there is less opportunity to suggest that the zero allocation was done on the sly or for a devious purpose. Thus, I am satisfied that the zero allocation in the BCC Declaration is not forbidden by the ***Act***. Nor, under these circumstances, is it unfair or oppressive.

## 2. Parking

[20] At Renaissance Station there was a plethora of outside surface parking. The site plan (Exhibit "C" to the affidavit of Rice) sets out areas known as "commercial surface parking" and "visitor surface parking". In the BCC Declaration at number 13, the commercial unit owners are stated to be "entitled to use of that portion of

the common elements designated as commercial parking area". Not only does it not say they are entitled to exclusive use of that area, it also does not say they are entitled to exclusive or any use of the visitor parking area. However, despite this, TJR has admittedly monopolized control of both parking areas and has rented spots to commercial tenants. BCC contends that this behaviour constitutes oppressive conduct since these areas are part of the common elements and as such their upkeep is being funded by residential unit owners who are not only not receiving rent for their use but are also being denied use of these spots.

[21] TJR responds that BCC does not own any parking spots as they belong to the unit owners instead. TJR acknowledges that since 2014 it has used all the commercial parking stalls, as well as the 10 stalls designated for visitor parking. They also concede that BCC may have formed a reasonable expectation that all unit owners would have been entitled to use these 10 stalls for temporary visitor parking. However, once this issue arose, TJR purchased additional surface parking for the use of residential unit owners and their temporary visitors without charge. Residents now have more parking available to them than before. TJR relies on ***3461662 Manitoba Ltd. et al. v. 3211304 Manitoba Ltd. et al.***, 2017 MBQB 204 (CanLII) ("***Smith***"), where Simonsen J. (as she then was) said:

> [31] It is not every unmet reasonable expectation will give rise to the equitable considerations that ground an action for oppression. To complete a claim for oppression, there must be unfair conduct that has prejudicial consequences. The court must be satisfied that the conduct falls within the concepts of "oppression", "unfair prejudice" or "unfair disregard". These concepts were addressed in ***BCE*** (paras. 91-94). While "oppressive" conduct has been called "burdensome, harsh and wrongful" or "a visible departure from the standards of fair dealing", conduct involving "unfair prejudice" and "unfair disregard" entails wrongs falling short of the conduct

> connoted by "oppression". Conduct that "unfairly disregards" the interest of the applicant is the least serious of the three. The three types of conduct do not constitute watertight compartments, and often overlap and intermingle. Quite simply, the oppression remedy seeks to ensure fairness – what is just and equitable.

[22] In this case, no residential unit owner has contended that they were prejudiced by the parking situation. As a result, I agree with TJR that looking at the situation overall, it is unreasonable to categorize this issue as unfair or oppressive, especially since it appears to have been remedied by TJR.

### 3. Furniture

[23] BCC describes as a minor irritant the purchase of $50,000 worth of furniture for the common elements in 2009. They allege this to be but one example of an ongoing pattern of improper conduct by TJR. BCC submits that prospective buyers of the residential units were induced to purchase partly on the basis of the availability of a fully furnished recreational area. Purchasers were not told that they would need to purchase these items later. Yet, according to the minutes of the first annual general meeting of BCC from 2009 (Exhibit "P" of the affidavit of Funk), the minutes show that a resolution was put forward to purchase this furniture for $5,000 a year for 10 years, which money was transferred from BCC's reserve fund to TJR in only three years. This was voted upon in 2009 and yet no complaint was made until this application was filed in February 2019, some 10 years later. I agree with TJR that this item is statute-barred.

[24] Section 225(3) of the ***Act*** sets out orders that may follow if the court is satisfied that improper conduct has taken place. It reads as follows:

> **Contents of orders**
> 225(3) If the court is satisfied that improper conduct has taken place, the court may make one or more of the following orders:
>
> (a) an order prohibiting the conduct referred to in the application;
>
> (b) an order requiring the amendment of the condominium corporation's declaration or plan as specified in the order;
>
> (c) an order giving directions as to how matters are to be carried out so that the improper conduct will not continue or re-occur;
>
> (d) an order requiring the payment of compensation to the applicant, if he or she suffered a loss or damage due to the conduct;
>
> (e) an order requiring the payment of costs;
>
> (f) any other order the court considers appropriate.

[25] BCC has sought an order declaring that all provisions in the Declaration that contravene section 36, and all aspects of the Declaration that allocate a zero interest in the common elements to the commercial units are void. They also want an order amending the Declaration to allocate a reasonable percentage of the common elements to the commercial units. This would also require amending all the unit titles and mortgage registrations. BCC is claiming monetary compensation, as set out in Exhibit "R" to Funk's affidavit, in the sum of $420,447 as of the date of February 8, 2019 and $200,000 to be placed in trust for the legal work necessary to amend the unit titles.

[26] With the decision that section 36 of the ***Act*** does not disallow the zero allocation set out in the BCC Declaration, it follows that the essence of the request by BCC and concomitant damage assessment must fail. There is also no evidence of oppressive conduct or bad faith that would lead to the imposition of punitive damages or any damages at all.

## 4. Limitation issues - are these matters that are statute-barred?

[27] TJR alleges that all of the complaints set out by BCC are statute-barred. Not surprisingly, BCC disagrees. BCC submits that section 2(1)(k) of ***The Limitation of Actions Act***, C.C.S.M. c. L150, applies. It reads as follows:

> **Limitations**
> 2(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:
>
> . . .
>
> (k) actions grounded on accident, mistake, or other equitable ground of relief not hereinbefore specifically dealt with, within six years from the discovery of the cause of action;
>
> . . .

[28] BCC points to the Manitoba Court of Appeal decision in ***Cohen v. Jonco Holdings Ltd. et al.***, 2005 MBCA 48, as confirming the oppression remedy was also subject to this six-year equitable ground limitation period. It was only after September 14, 2016 when a new property manager was hired that the extent of the problems became clear. Thus, the limitation period has not expired. As well, BCC contends that the claim involving the zero allocation issue only arose when the new ***Act*** came into effect on November 5, 2015 and that the zero allocation is

in the nature of a continuing cause of action that continues to adversely affect residential unit owners.

[29] BCC contends that the most important relief it is seeking is the declaratory relief and that if the other requests for redress are statute-barred, then the declaratory relief request alone is not.

[30] It is TJR's position that the remedies BCC seeks that are grounded in oppression are statute-barred and are not saved by its claim for declaratory relief. BCC knew in 2008 that there was zero allocation for commercial units and if any concern existed then that was the time to raise it. At ***Glass v. Shelter Canadian Properties Ltd. et al.***, 2013 MBQB 132 (CanLII), Simonsen J. (as she then was) said as follows:

> [41] Declaratory relief, without consequential relief, is simply a declaration of rights. It is a discretionary remedy (Lazar Sarna, **The Law of Declaratory Judgments**, 3rd ed. (Toronto: Thomson Carswell, 2007) at page 15). In order to obtain such relief, the issue must be genuine, not moot or hypothetical and it must have some practical effect in resolving the issues the case raises (***Solosky v. Canada***, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821 and ***Bailey v. Canada (Attorney General)***, [2008] O.J. No. 4066 (S.C.J.) at para. 15). A declaratory judgment may be granted in contractual matters and with respect to property ownership rights (Sarna at pages 211-222 and 231-240). It may be granted even when the applicant does not have a cause of action sufficient to support a claim for consequential relief (Sarna at page 21).

Most importantly, she said as follows:

> [59] Furthermore, given my conclusion about the expiry of the limitation period in the contractual context, declaratory relief is not appropriate. ...

[31] I have found no evidence of oppression, but even if there is some, in my view it is statute-barred. I have already determined that the zero allocation for

commercial units, in my view, does not violate section 36 of the ***Act***, which really is at the heart of the request for declaratory relief and for substantial financial remedies. If I am wrong in that, then I agree with TJR that anything else of substance is statute-barred and therefore unable to be relied upon for personal remedies. As a result, the application by BCC is dismissed.

[32] As a result of these findings, TJR is entitled to costs. If they cannot be agreed upon, a time may be arranged for argument on this.

_____ J.