Court of King's Bench of Alberta

Citation: Condominium Corporation No 0210494 v Rotzang, 2024 ABKB 111

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Date: 20240227
Docket: 1501 07104
Registry: Calgary

Between:

Condominium Corporation No. 0210494 and the Owners of Condominium Corporation No. 0210494

Plaintiffs

- and -

Alex Rotzang, Geoff Upitis, Gil Gauthier, Condominium Corporation No. 0210500 and Condominium Corporation No. 0210499

Defendants

Reasons for Judgment
of the
Honourable Justice B.B. Johnston

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[1] The Plaintiffs, Condominium Corporation No. 0210494 ("Waterfront") and its owners, seek to proceed by way of summary trial. They seek judgment against the Defendants, Condominium Corporation No. 0210500 ("Hall") and Condominium Corporation No. 0210499 ("Parkade") for amounts related to assessments conducted in 2015 and 2016 and amounts alleged owing under the bylaws of Waterfront, Hall, and Parkade (the "Condominium Corporations") and the Common Maintenance Agreement made effective February 2002 (the "CMA").

[2] The Defendants ask that portions of the evidence be struck. They further object to the matter proceeding by way of summary trial. Alternatively, they ask that the Plaintiffs' claims be dismissed

History of Proceedings

[3] The Plaintiffs filed a statement of claim on June 19, 2015, and an amended statement of claim on June 10, 2016.

[4] A statement of defence was filed on July 14, 2016.

[5] On October 22, 2021, the action against the individual Defendants was dismissed pursuant to the consent dismissal order of Justice B.A. Miller.

[6] The Plaintiffs filed an application for summary trial along with the affidavit of Stephen Krasnow on August 11, 2022 (the "Original Krasnow Affidavit").

[7] On January 31, 2023, Justice Marion granted a consent order (the "Consent Order") whereby the affidavit of Stephen Krasnow was removed from the court record and replaced by a new affidavit sworn by Stephen Krasnow on December 8, 2022 (the "Krasnow Affidavit") .

[8] On June 15, 2023, the Defendants filed a notice of objection to the summary trial.

[9] The affidavit of Alexander Rotzang was sworn on April 19, 2023, and filed in response to the application for summary trial (the "Rotzang Affidavit").

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Background

[10] The Condominium Corporations were built by Pauls Properties Corp. (the "Developer"). Prior to the initial occupancy of the condominiums, the CMA was signed by the Developer on behalf of the Condominium Corporations.

[11] Parkade is composed of an underground parking garage which has common driving areas and titled parking stalls and storage units. Electrical, mechanical and utilities equipment, and garbage collection spaces are also part of Parkade.

[12] The owners in Hall and Waterfront respectively own 62% and 38% of Parkade.

[13] The Parkade Board is composed of three owners of Hall and two owners of Waterfront.

[14] The bylaws of each of the Condominium Corporations specify that maintenance obligations and shared responsibilities are to be divided as follows: Hall: 59.26%; Waterfront: 35.8% and Parkade 4.94%.

[15] During the Parkade Board meeting on May 15, 2013, concerns were raised regarding how the Parkade expenses were allocated "in light of the CMA." The Parkade Board agreed to send a letter to the Boards of the Condominium Corporations requesting a meeting. Consideration was given to discussing revisions to the CMA.

[16] In the years that followed, the following occurred:

1. On May 4, 2015, Hall provided Waterfront with a notice of termination of the CMA "executed by the [D]eveloper" effective May 1, 2015, in accordance with section 17(3)(b) of the CMA. The notice further stated, "we would be happy to meet with members of [the Waterfront] Condominium Board to discuss the formation of a new joint management agreement."

2. In May 2015, Parkade undertook concrete resurfacing in the parking facility. An assessment of $50,031 (the "2015 Parking Lot Assessment") was apportioned and charged back to the owners of individual parking stalls.
3. In June 2015, Parkade advised Waterfront that it would no longer pay for garbage collection services for Waterfront (the "Garbage Decision").
4. On June 2, 2016, Parkade issued a special assessment against Waterfront in the amount of $104,446.00 (the "2016 Special Assessment") which was calculated as follows:
    - retroactive charges for garbage collection paid by Parkade from 2002 to 2016;
    - retroactive charges for fire alarm and security monitoring expenses paid by Hall based on a 38% allocation; and
    - expenses associated with repair costs for snowmelt and heated sidewalks for the Waterfront entrance for 2014-2015.

[17] The above actions prompted the commencement of this litigation by Waterfront to assert its rights under the CMA, the bylaws of the Condominium Corporations and relevant legislation. In connection with these proceedings, the Defendants challenge and seek to strike some of the evidence adduced by the Plaintiffs while also defending the actions taken.

Common Maintenance Agreement

[18] The CMA provides as follows:

> PREAMBLE/RECITALS:
>
> ...
>
> D. Princeton Hall, Waterfront/Citescape and the Parking Facility are being or have been developed as an integrated development by Pauls Properties Corporation, with the intention that the Parking Facility serves both Princeton Hall and Waterfront/Citescape, and the Unit owners in both Princeton Hall and Waterfront/Citescape will own parking units and storage units in the Parking Facility and PHC [Hall] and W/C will own certain servicing, access and other units in the Parking Facility and that Parkco will be responsible for the administration, maintenance, management and control of the Parking Facility, the common garbage disposal facility, and the grounds and surface facilities generally the responsibility of PHC and W/C to administer, maintain, manage and control, respectively, forming part of Princeton Hall and Waterfront/Citescape, together, with any surface property being the responsibility of Parkco.
>
> ...
>
> ... THE PARTIES AGREE, as follows, THAT:
>
> ...
>
> 3. Each of PHC and W/C hereby grant to Parkco, together with its respective successors and assigns, and all owners and successors in title (inclusive of occupants) to the Parking Facility, the non-exclusive easement and license:

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(a) To enter onto and into (and remain thereon or therein as reasonably necessary) and pass through, either or both, Princeton Hall and Waterfront/Citescape, as the case may be, from time to time and at any time, to administer, maintain, manage and control of [sic] the Parking Facility and the grounds and surface facilities and the facilities developed on and forming part of Princeton Hall and Waterfront/Citescape to carry out its responsibilities in respect of the Parking Facility and under this Agreement.

...

4. In consideration for the non-exclusive license granted by the PHC and W/C pursuant to clause 3 above, and other good and valuable consideration now passing from PHC and W/C to Parkco (the receipt and sufficiency of which is hereby expressly acknowledged), Parkco, W/C, and PHC agree:

(a) Each of PHC and W/C hereby retain and employ Parkco to, and Parkco hereby agrees to be responsible for administration, maintenance, management and control (inclusive of cleaning and debris and snow removal) of the grounds and surface facilities forming part of Princeton Hall and Waterfront/Citescape and pursuant to this Agreement and thereafter throughout the subsistence of this Agreement and for so long as they enjoy or are entitled to enjoy the license described in clause 3 hereof.

(b) Unless and until otherwise agreed to by all parties hereto, the responsibilities described in clause 4(a) hereof shall be undertaken and carried out by Parkco, to the standards and requirements reasonably and mutually established by Parkco, W/C, and PHC from time to time.

(c) Parkco shall be reimbursed for its costs in carrying out its responsibilities under this clause 4 (inclusive of all reasonable administrative expenses and a reserve for depreciation or replacement) on invoice, and in the event of any failure on the part of any parties to make timely payment, shall be entitled to its costs of collection.

(d) PHC, W/C and Parkco will share the expenses of work and responsibilities described in clause 4(a) and all improvements made thereto on the following basis:

PHC	59.2%
W/C	35.8%
Parkco	4.94 %

5. In addition to the foregoing, the parties agree that Parkco will operate the common garbage disposal facility on behalf of W/C, PHC and itself and the cost of its operating such facility will be shared amongst the parties in accordance with clause 4(d) above.

6. The rights and privileges hereby granted are and shall be covenants running with title to the Lands.

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...

Waterfront Bylaws

[19] The Waterfront bylaws state in part:

DEFINITIONS AND INTERPRETATION

1. In these Bylaws, unless the context or subject matter requires a different meaning:

...

(q) "Partner Condominium Project(s)" mean the multifamily residential condominium development(s) and the parkade condominium(s) related thereto constructed, or to be constructed, as the case may be, immediately adjacent to and connected with the Project and forming part of "the Princeton" development (the "Development");

...

DUTIES OF THE CORPORATION

4. In addition to the duties of the Corporation set forth in the Act, the Corporation, through its BoardSHALL:

(a) control, manage, maintain, repair, replace and administer the common property (except as hereinbefore and hereinafter set forth) and all real property, chattels, personal property or other property owned by the Corporation for the benefit of all of the owners and for the benefit of the entire condominium project;

...

(c) maintain and repair (INCLUDING renewal where reasonably necessary) exterior and hallway lighting, fire alarms, panels and extinguishers, all heating and air conditioning systems supporting the common property, the entry system, all electrical and mechanical rooms, and all pipes, wires, cables, ducts, conduits, plumbing, sewers and other facilities for the furnishing of utilities for the time being existing in the parcel and capable of being used in connection with the enjoyment of more than one (1) unit or common property;

...

(i) clear snow, slush and debris from the entrance areas and walkways of the project within a reasonable time frame and keep and maintain in good order and condition all areas of the common property designated for vehicular or pedestrian traffic, the entrance areas, all elevators (and all shafts and pits) the hallways, stairs and stairwells, mailboxes, intercom and security systems lobbies, fire prevention systems and boxes, storage and janitorial equipment spaces, mechanical, boiler and electrical rooms, central alarm panels and all grassed or landscaped areas of the common property PROVIDED THAT the general cleaning and maintenance of any

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privacy area designated to an owner under Bylaw 5 or Bylaw 58 shall be the prime responsibility of the owner to whom such privacy area has been assigned;

...

AGREEMENTS WITH PARTNER CONDOMINIUM PROJECTS

66. The Project forms part of an overall development with the Partner Condominium Projects, intended to be coordinated to deliver uniform services and consistent treatment of maintenance service on the overall Development, and accordingly:

(a) The Corporation shall enter into Agreements with the Parter Condominium Corporations to provide for the maintenance and administration of areas of common usage to occupants of the whole of the Development, including the maintenance of all grounds and landscaping and the operation of a common trash disposal facility;

...

Hall Bylaws

[20] Portions of the Hall bylaws state as follows:

...

1.1 Definitions - Specific

For the purposes of this By-law and unless the context wherein used shall otherwise require, the following words, terms, phrases and expressions shall be ascribed the meanings and definitions as are hereinafter set forth:

...

"Partner Condominium Project(s)" means the multifamily residential condominium development(s) and parkade condominium(s) related thereto constructed, or to be constructed, as the case may be, immediately adjacent to and connected with the Project and forming part of "the Princeton" development (the "Development");

...

2.1 Agreements with Partner Condominium Projects

The Project forms a part of [the] Development with the Partner Condominium Projects, intended to be coordinated to deliver uniform services and consistent treatment of maintenance service on the overall Development, and accordingly:

...

(d) The Corporation shall enter into Agreements with the Partner Condominium Corporations to provide for the maintenance and administration of areas of common usage to occupants of the whole of the Development, including the maintenance of all grounds and landscaping and the operation of a common trash disposal facility;

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...

4.2 Duties of Corporation

In addition to the duties imposed upon the Corporation under the Act, the Corporation shall:

> (c) maintain and repair (including renewal where reasonably necessary) any and all elevators (including shafts and pits), automatic garage doors, comprehensive surveillance and security systems, heating and air conditions systems, pipes, wires, cables, ducts, conduits, plumbing systems, sewers, and other facilities for the furnishing of utilities existing in the Parcel and servicing the Project and capable of being used in connection with the enjoyment of one or more Unit or Common Property, all prescribed in and subject to Article 3.2 hereof;

...

> (h) remove ice, snow, slush and debris from and keep and maintain in good order and condition all areas of the Common Property designated for vehicular or pedestrian traffic or outside parking and keep and maintain in good order and condition (to the extent the Owners or any of them are not responsible to maintain same), as applicable , the ground floor entrances, security control areas, lobbies, vestibules, foyers, waiting rooms, telephone rooms, water and sump rooms, storage and janitorial equipment spaces, trash compactor and garbage storage areas, mail rooms, generator rooms, mechanical, furnace and electrical rooms, gas meter rooms, diesel fuel storage rooms, central alarm and control rooms, cooling towers, hallways, stairs and stairwells and all grassed or landscaped areas of the Common Property, provided that the maintenance of any Exclusive Use Area designated under Article 8 hereof shall be the prime responsibility of the Owner to whom such Exclusive Use Area has been assigned;
>
> ...

Parkade Bylaws

[21] Portions of the Parkade bylaws provide as follows**:**

2.2 Agreements with Partner Condominium Projects

The Project forms a part of an overall development with the Partner Condominium Projects, intended to be co-ordinated to deliver uniform services and consistent treatment of maintenance services on the overall development, and accordingly:

…

> (d) The corporation shall enter into Agreements with the Partner Condominium Corporations to provide for the maintenance and administration of areas of common usage to occupants of the whole of the development, including the maintenance of all grounds maintenance and

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landscaping and the operation of a common trash disposal of solid waste or trash.

...

3.2 Repair and Maintenance

In clarification of the repair and maintenance responsibilities of the Corporation and each Owner, as prescribed by the Act and this By-law and notwithstanding anything to the contrary implied by or expressed in the Condominium Plan:

...

(b) the Corporation shall be responsible for the repair, maintenance and replacement, as and when reasonably necessary, of the Common Property and the property of the Corporation, property insured by the Corporation to the extent of the proceeds paid to the Corporation, the heating (including heat distribution), access doors to the Units, ventilating, plumbing and electrical systems in the Project (subject to the Owner's responsibility in Article 3.2(a) above), all vehicular parking areas including driveways, ramps and all Parking Units and structural elements of the Project within the Unit and all Exclusive Use Areas;

...

(d) notwithstanding anything to the contrary expressed or implied above, repair, maintenance or replacement necessitated by the act or omission of an Owner (or someone for who such Owner is legally responsible), although the responsibility of the Corporation, shall be effected at the expense and cost of such Owner; ...

...

4.2 Duties of Corporation

In addition to the duties imposed upon the Corporation under the Act, the Corporation shall:

(a) control, manage, maintain, repair and administer the Common Property (except as expressly required to be done by an Owner pursuant to this By-law) and all real property, chattels, personal property or other property owned by the Corporation for the benefit of all of the Owners and for the benefit of the entire Project,

...

(c) maintain and repair (including renewal where reasonably necessary) any and all elevators (including shafts and pits) automatic garage doors, comprehensive surveillance and security systems, heating and air conditioning systems, pipes, wires, cables, ducts, conduits, plumbing systems, sewers and other facilities for the furnishing of utilities existing in the Parcel and servicing the Project und capable of being used in connection with the enjoyment of one or more Unit or Common Property, all as prescribed in and subject to Article 3.2 hereof;

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...

(h) remove ice, snow, slush, and debris from and keep and maintain in good order and condition all areas of the Common Property designated for vehicular or pedestrian traffic or outside parking and keep and maintain in good order and condition (to the extent the Owners or any of them are not responsible to maintain same), as applicable, the ground floor entrances, security control areas, lobbies, vestibules, foyers, waiting rooms, telephone rooms, water and sump rooms, storage and janitorial equipment spaces, trash compactor and garbage storage areas, mail rooms, generator rooms, mechanical, furnace and electrical rooms, gas meter rooms, diesel fuel storage rooms, central alarm and control rooms, cooling towers, hallways, stairs and stairwells and all grassed or landscaped areas of the Common Property; provided that the maintenance of any Exclusive Use Area designated under Article 9 hereof shall be the prime responsibility of the Owner to whom such Exclusive Use Area has been assigned;

(i) provide adequate garbage chutes and garbage receptacles or containers on the Common Property for use by all the Owners and provide for regular collection therefrom;

...

Condominium Property Act

[22] Relevant provisions of the *Condominium Property Act*, RSA 2000, c C-22 (the "*CPA*") state:

Other agreements

17.1(1) Except as otherwise provided in section 17 and the regulations, a corporation may terminate an agreement within 12 months after the time at which its board first consists of directors who were elected when persons who were at arm's length from the developer owned or held units representing more than 50% of the total unit factors for all the units.

(2) Subsection (1) applies despite any term to the contrary in the agreement to be terminated.

(3) To terminate an agreement under this section, the corporation must give written notice of the termination date to the other party to the agreement at least 60 days, or any shorter period specified in the agreement, before the termination date.

...

Issues

[23] The issues include:

1) Should the challenged portions of the Krasnow Affidavit be struck?

2) Is this matter appropriate for summary trial?

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3) Was the CMA in place? If so, was the CMA terminated?

4) What amounts, if any, is Waterfront entitled to recover related to the Garbage Decision, the 2015 Parking Lot Assessment, and the 2016 Special Assessment?

5) Is the 2016 Special Assessment statute barred by the *Limitations Act*?

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Analysis

Should Portions of the Krasnow Affidavit be Struck?

[24] Rule 13.18(3) of the Rules of Court, provides:

> (3) If an affidavit is used in support of an application that may dispose of all or part of a claim, the affidavit must be sworn on the basis of the personal knowledge of the person swearing the affidavit.

[25] The Defendants ask that portions of the Krasnow Affidavit be struck as they do not comply with rule 13.18(3), specifically paragraphs 14, 17, 21, 23, 26, 28, 29-31, 34, 39-40, 47, 54, 58, 64 and Exhibits J, M and S

[26] The Defendants initially raised concerns relating to portions of the Original Krasnow Affidavit. As a result, the Plaintiffs filed the Krasnow Affidavit which replaced the Original Krasnow Affidavit in its entirety. The Consent Order stated that, "[b]y consenting to this Order, the Defendants are not waiving their right to challenge the admissibility of any portions of the attached replacement affidavit at the Summary Trial in this matter."

[27] The Plaintiffs raise concerns that the Defendants waited until trial to raise additional issues with parts of the Krasnow Affidavit. I share these concerns, as waiting until trial to raise objections to evidence can often lead to unnecessary delay and adjournments. Nevertheless, the Plaintiffs confirmed that—notwithstanding their concerns with the lateness of the objections—they did not want to adjourn the matter pending a preliminary ruling on the admissibility of certain portions of the affidavits. They urged this Court to proceed with the summary trial.

[28] I agree that it would have been preferable for the Defendants to outline in advance their additional concerns with the Krasnow Affidavit. However, I also note that the Consent Order expressly reserved the right of the Defendants to challenge portions of the Krasnow Affidavit at the hearing of this matter. The Plaintiffs signed the Consent Order with full knowledge this was a term of the Consent Order. Affidavits must conform to the requirements of the rules. The Plaintiffs should be well aware of these requirements, particularly when the Defendants previously raised concerns with portions of the Original Krasnow Affidavit.

[29] I therefore, find it appropriate to proceed with the hearing of the Defendants' application to strike together with the Plaintiffs' application for summary trial.

[30] The Defendants argue that portions of the Krasnow Affidavit are not sworn based on personal knowledge.

[31] As this Court noted in ***Attila Dogan Construction v AMEC Americas Limited,*** 2015 ABQB 120 at paras 59-60 aff'd 2015 ABCA 406 [***Attila Dogan***]:

> [Rule] 13.18 recognizes that where an application concerns disposition of some or all claims in a case, as here, the Court requires evidence to meet the standards

required at trial. As Veit J. states in ***Murphy v Cahill***, 2012 ABQB 793 (Alta Q.B.) at para 25:

> It's a sensible rule because litigants shouldn't be vulnerable to having their rights finally determined by evidence that would not be admissible at trial, and relying on inadmissible evidence is like having no evidence at all.

[Rule] 13.18(3) clearly provides that an affiant must support his or her sworn statements in a final application with "personal knowledge." This requirement embodies the common law rule against hearsay – an affiant must be capable of being tested by cross-examination on his or her own knowledge.

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[32] Even if this were an interlocutory application, where an affidavit can be sworn on information and belief, the source of the information must be disclosed. Although business records may fall under an exception to the hearsay rule, authentication is typically required: ***Attila Dogan*** at paras 80-86 citing ***R v Schwartz***, [1988] 2 SCR 443 at 476, 1988 CanLII 11 (SCC); ***R v Monkhouse***, 1987 ABCA 227 at para 24; ***Wirring v Law Society of Alberta***, 2023 ABKB 580 at para 51 [***Wirring***].

[33] The Defendants also challenge certain paragraphs of the Krasnow Affidavit on the basis that it purports to provide legal opinion and argument based on Mr. Krasnow's interpretation of certain bylaws.

[34] This type of evidence is generally considered improper, as deponents are restricted to giving evidence on matters of personal knowledge on the facts in issue: ***Wirring*** at paras 54-55. In ***Sahaluk v Alberta (Transportation and Safety Board)***, 2013 ABQB 683 at paras 35-36, the Court noted:

> There is no dispute between the parties as to the nature of the general rule – affidavit evidence should not include argument or the opinion of lay persons. *Alberta Human Rights Commission v. Alberta Blue Cross Plan*, 1983 ABCA 207 (CanLII), 48 A.R. 192, 193 (C.A. 1983) ("affidavits ought to be confined to evidence"); *Alberta Treasury Branches v. Leahy*, 1999 ABQB 185 (CanLII), 234 A.R. 201, 228 (Q.B. 1999) ("The purpose of affidavit evidence is to place the necessary facts before the court and should not contain argument, opinions or conclusions"); ... The deponent who gives evidence of which he or she has personal knowledge and is restricted to the facts-in-issue provides the court with material which will assist it to discharge its fact-finding role. Seldom will it be the case that a layman in constitutional litigation can provide an opinion which will be reliable and assist the court.
>
> ...
>
> Paragraphs 19, 20, 24, 25 and 26 of Mr. Savage's affidavit and paragraphs 6, 11 and 18 of Mr. Pearse's affidavit incorporated opinions and argument which are best left to counsel based on facts established in accordance with the rules of evidence. *Canada Post Corp. v. Smith*, 1994 CanLII 10544 (ON SC), 20 O.R. (3d) 173, 188 (Div. Ct. 1994) (the striking of an entire affidavit of a lawyer not qualified as an expert was upheld); *Bell Canada v. Canadian Human Rights Commission*, 1990 CanLII 12977 (FC), [1991] 1 F.C. 356, 361 (Tr. Div. 1990) ("The respondents may instruct their counsel to posit such interpretations of the

> statute in oral or written argument but the respondent qua deponent ... cannot be permitted to give ... her interpretation of the statute law") ...

[35] Counsel for the Plaintiffs consented to strike both paragraph 28 (including Exhibit I) and paragraph 64. These paragraphs and the related exhibit are struck.

[36] With respect to the balance of the impugned paragraphs, I find the following:

> Paragraph 14: I decline to strike this paragraph. The deponent has given evidence as to his involvement with the parties including that he acquired his unit in Waterfront in 2011, that he joined the Waterfront Board in 2016, that he is a unit holder in Parkade, is familiar with their bylaws, and he has reviewed audited financial statements and budgets. The deponent's experience with the parties and their business records provides sufficient basis for the evidence set out in this paragraph.
>
> Paragraph 17: I decline to strike this paragraph. As a unit holder in Parkade, the deponent would be aware of communications to unit holders. Further, given the deponent's involvement with the Waterfront Board and as a unit holder of Parkade, his reference to ordinary course business records, including the bylaws, the reserve fund studies, and reserve fund plans, is not improper.
>
> Paragraph 21: I decline to strike this paragraph as it identifies the decisions of prior Boards of Parkade and provides general commentary on how common expenses had been treated historically.
>
> Paragraph 23: I decline to strike this paragraph. Again, given the evidence of the deponent's personal involvement and review of business records, the deponent's evidence as to how matters were handled historically is admissible.
>
> Paragraph 26: I strike this paragraph. Identifying legal issues is a matter of argument and not fact.
>
> Paragraphs 29-31: I decline to strike paragraphs 29 and 31 as they merely identify legislation without commentary. I strike the first and second sentences of paragraph 30 as they suggest an interpretation by the deponent.
>
> Paragraph 34 and Exhibit J: I decline to strike the challenged portions of this paragraph or Exhibit J. While Exhibit J is technically hearsay, I decline to strike it as it simply provides clarification to Exhibits K and L, which are ordinary course business records by the author of those records.
>
> Paragraph 39: I strike the second sentence of paragraph 39 as it is hearsay and inadmissible on a summary trial.
>
> Paragraph 43: I strike the last sentence of paragraph 43 as it is hearsay and inadmissible on a summary trial.
>
> Paragraph 47: I decline to strike this paragraph given the deponent's evidence of his personal involvement with Waterfront and Parkade and of his having reviewed business records.

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Exhibit M: I decline to strike Exhibit M. While the letter is hearsay, there is no dispute that it was prepared by Montgomery Ross and was sent to and received by the parties to this lawsuit, and would be an ordinary course business record.

Paragraph 54: I strike the second sentence of this paragraph as it is argument based on the deponent's interpretation of the bylaws.

Exhibit S: I decline to strike Exhibit S given the deponent's evidence of his personal involvement and review of business records.

Paragraph 58: I decline to strike this paragraph even though the source of the information is not stated. It is my view that the deponent's evidence as to his involvement and as to having reviewed business records would allow him to give evidence as set out within this paragraph.

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Is Summary Trial Appropriate?

[37] The summary trial rules are set out in rules 7.5 to 7.11.

[38] The Plaintiffs ask that this matter proceed by way of a summary trial in accordance with rule 7.5(1). They argue the case is a simple matter of contractual interpretation, that credibility is not an issue, that there would be great cost to the parties to have to proceed with a full trial and there is prejudice to the unit holders who have sold, or want to sell, their units.

[39] The Defendants disagree. They argue that the issues are complex and cannot be determined through affidavit evidence alone. In particular, the Defendants argue that the court must hear evidence from key witnesses related to whether the CMA is enforceable. Further, the Defendants argue that resolution of this matter will depend on findings of credibility of several witnesses and the court is lacking key evidence from MNP, as it relates to their audit that resulted in the 2016 Special Assessment, and from Clear Path Engineering, as it relates to the parkade resurfacing repairs.

[40] I agree with the Plaintiffs that this matter is suitable for summary trial. The matter is not complex. Summary trial will facilitate resolution of all the claims. I also agree that the matter involves the interpretation of the Condominium Corporation bylaws and the CMA.

[41] As the Court of Appeal in ***Dunn v Condominium Corporation No 042 0105***, 2024 ABCA 38 at para 17 recently noted, "Condominium bylaws are more akin to laws and regulations passed by a legislative body than contractual provisions, and courts have interpreted them accordingly." Such matters are particularly well suited for summary adjudication.

[42] Parties are required to put their best foot forward on summary trial applications. I see no reason why the Defendants could not have filed affidavits from both MNP and Clear Path Engineering if they felt that those companies had key evidence to contribute to this matter. I note the Defendants examined multiple parties as part of their questioning. The Defendants provide no reason why they could not have examined the other parties whose evidence they now say may be necessary. There is also no indication in their materials as to why such evidence is necessary.

Was the CMA in Force?

[43] The Defendants argue the CMA was never in force and was never registered against title. Further, the Defendants note that the CMA appears to have been executed by the same individual on behalf of all the Condominium Corporations. They also rely in part on the assertion of Mr.

Rotzang, who was elected to the Parkade Board in June 2012, that he did not become aware of the CMA's existence until he was provided a copy from a fellow board member in April 2013. No official copy of the CMA has been located.

[44] The Plaintiffs disagree. They argue the CMA was executed by the Developer and the parties had been following the CMA since it was executed.

[45] I find that the evidence demonstrates on a balance of probabilities that the CMA was in force.

[46] While the CMA was not registered against title to the lands, this alone is insufficient to show that the CMA was not intended to bind the parties. The Defendants assert that the fact that the CMA was not registered on title is suggestive of it not being in effect or possibly being some form of "secret agreement" put in place by the Developer that only surfaced when the development was turned over. While secret agreements put in place to benefit a developer are cause for concern and could be invalidated under the *CPA*, I do not see the CMA as such an agreement. The CMA in this case provides for the integration of residential premises with parking and common areas and allocates the responsibilities flowing from that arrangement. If the CMA was not in effect, then how would the parties know how the Condominium Corporations would allocate responsibilities and costs amongst each other? The CMA is the only document that purports to precisely do that. The Defendants have not put anything forward to suggest that there are or may be other agreements or arrangements that apply, or that any of the witnesses they identify can provide such evidence.

[47] With respect to the argument that there are no "official copies" of the CMA, such an argument would have more merit in a case where alternative versions of a contract are put forward. In this case there is only one CMA in evidence and no suggestion that other versions exist or have ever existed. There is no reasonable basis to conclude that a trial would provide any additional evidence to aid the court in determining the issue of whether the CMA in evidence was in force.

[48] In his affidavit and in cross-examination, Mr. Rotzang confirmed that the agreement was executed by the Developer on behalf of the Condominium Corporations. No authority has been cited that an agreement is invalid on the basis that it was signed by the same individual on behalf of all the Condominium Corporations, nor would I expect to find such authority given it is trite law that a corporation is a legal entity separate and apart from its officers, directors, and shareholders. As the same developer developed all the Condominium Corporations "as an integrated development", it is not surprising that the same individual would sign for each corporate party to the CMA.

[49] Although the Defendants have identified some anomalies in the attribution of expenses, the preponderance of the evidence supports that the parties intended that the CMA be followed and that it was followed in practice. The fact that one board member was not aware of the CMA's existence does not erase the fact that the other members of the boards were aware of it and operated in accordance with its terms.

[50] Some form of tri-partite management agreement was clearly contemplated by all the Condominium Corporations. The bylaws of Hall (section 2.1), Waterfront (section 66) and Parkade (section 2.2) all confirm that the respective projects form "part of an overall development with the Partner Condominium Projects, intended to be coordinated to deliver

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uniform services and consistent treatment of maintenance service on the overall Development" and, accordingly, each Condominium Corporation "shall enter into Agreements with the Partner Condominium Corporations to provide for the maintenance and administration of areas of common usage to occupants of the whole of the Development, including the maintenance of all grounds and landscaping and the operation of a common trash disposal facility." The CMA is consistent with those bylaws. Equally important, there is no evidence of there being any other agreement, verbal or written, aside from the CMA.

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[51] Although not determinative of the issues, I note there is significant evidence in the affidavits that supports the existence of a valid and enforceable CMA. On April 13, 2013, an email was sent to Mr. Rotzang noting "here is a copy of the CMA that was put in place in 2002." The Parkade Board minutes from the meeting held May 15, 2013, indicate they agreed to request a meeting between the Boards of the Condominium Corporations to review "how the Parkade Expenses are allocated in light of the Common Maintenance Agreement." The Hall Board compiled a list of initiatives on June 20, 2013, which included "renegotiation" of the CMA.

[52] On May 4, 2015, the Hall Board provided notice that they were terminating the CMA executed by the Developer, effective May 1, 2015. The minutes from the following day's meeting of the Parkade Board indicate that they had obtained legal advice to terminate the CMA "entered into by the developer, Pauls Properties" and that a motion was made by Mr. Rotzang, and carried, to terminate the CMA pursuant to section 17(3) of the *CPA* and to negotiate a new CMA. The Parkade Board further indicated they would be prepared to meet with members of Waterfront to discuss the formation of a new joint management agreement. The July 14, 2016, Hall Board meeting minutes also refer to a "discussion to set a meeting with [Waterfront] to replace the CMA which was terminated May 1, 2015."

[53] The parties' actions in purporting to terminate the CMA, described above, is further evidence that the CMA was in force.

[54] For the above reasons, I find the CMA was in force and binding on the Condominium Corporations.

If the CMA was in Force, was it Terminated?

[55] Having determined that the CMA was in force, I must consider whether the CMA was validly terminated.

[56] The Defendants assert that the CMA was terminated in May 2015. The Plaintiffs disagree.

[57] The CMA is short. The CMA consists of five recitals (which are incorporated into the terms of the agreement), eight sections and three schedules. A review of the CMA makes it plain that the CMA does not contain provisions setting out how a party may terminate the agreement. It is equally clear from the CMA wording that the Condominium Corporations were developed as "an integrated development" with the intention that Parkade's sole purpose was to serve both Waterfront and Hall and their respective unit owners. It makes sense a developer would not provide for termination rights in order to inextricably link parking and storage facilities with the residential units that those facilities were to serve.

[58] This is exactly what the Developer seems to have done. Section 4(b) of the CMA states that unless and until otherwise agreed by all parties, Parkade's responsibilities under the CMA would remain in effect. This express wording makes clear that all parties must agree before

changing Parkade's responsibilities under the CMA. In this case, despite the notice from Hall purporting to terminate the CMA, such termination was not agreed to by all parties.

[59] Notwithstanding that there is no provision in the CMA that allows for termination, section 17.1 of the *CPA* allows condominium corporations to terminate any agreements that were put in place by the developer "within 12 months after the time at which its board first consists of directors who were elected when persons who were at arm's length from the developer owned or held units representing more than 50% of the total unit factors for all the units." The evidence shows that no such notice was given within the 12 months after the Developer turned over control of the boards of the Condominium Corporations. As such, Section 17.1 offers no assistance to the Defendants who have sought to terminate the CMA.

[60] For the reasons set out above, I find that the CMA was not validly terminated in May 2015.

2015 Assessments

Garbage Assessment

[61] In June 2015, Parkade ceased paying for garbage collection on behalf of Waterfront.

[62] The Plaintiffs argue this decision was contrary to Parkade's bylaws and the CMA.

[63] I agree.

[64] The words of the bylaws must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the *CPA* and bylaws, and the intention of the drafters: ***Dunn*** at para 18 citing ***Owners: Condominium Plan No 7721985 v Breakwell*** at paras 54-56. I have reviewed above, the context of the bylaws including the interrelated nature of the Condominium Corporations and their bylaws, the CMA and the *CPA*.

[65] Section 4.2(i) of the Parkade bylaws states that Parkade is required to "provide adequate garbage chutes and garbage receptacles or containers on the Common Property for the use by all the Owners and provide for regular collection therefrom."

[66] Additionally, section 5 of the CMA requires Parkade to "operate the common garbage disposal facility on behalf of [the Condominium Corporations] and the cost of its operating such facility will be shared amongst the parties in accordance with clause 4(d) above."

[67] I therefore find the Defendants failed to abide by the obligations in the CMA and the Parkade bylaws as it relates to the garbage collection.

[68] Considering my finding, it will be necessary for Parkade to account for and pay for the garbage collection costs from June 2015 onwards and continue the allocations in accordance with the CMA.

Parking Lot Assessment

[69] The Plaintiffs ask that they be reimbursed for the 2015 Parking Lot Assessment. They assert the repairs were the obligation of Parkade and should have been paid out of the Parkade reserve fund. I agree.

[70] As is acknowledged by the Defendants, the Parkade bylaws require Parkade to repair, maintain and replace parking areas. Section 3.2(b) of the Parkade bylaws makes clear that Parkade is responsible for "the repair, maintenance and replacement, as and when reasonably

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necessary" of "... all vehicular parking areas including driveways, ramps and all Parking Units and structural elements of the Project within the Unit and all Exclusive Use Areas." Parking Units are defined as prescriptive units "which are to be used solely for the purpose of parking motor vehicles."

[71] The Defendants argue, however, that section 3.2(d) then prescribes that "notwithstanding anything to the contrary expressed or implied above, repair, maintenance or replacement necessitated by the act or omission of an Owner (or someone for who such Owner is legally responsible), although the responsibility of the Corporation, shall be effected at the expense and cost of such Owner."

[72] The Defendants have suggested that it was appropriate to allocate the costs to the individual owners of the Parking Units under section 3.2(d) as the amount of repair required by each stall depended on the owner's upkeep of the stall. The Defendants' evidence is that "Parkade issued invoices to all owners respecting the repairs to their individual parking stalls. The amount of each invoice varied based on the degree of damage and repairs completed in respect to each individual stall."

[73] The Defendants submit as evidence the contractor's quote for the resurfacing work that was accepted. The quote does not include an individual cost for each parking stall. Rather the quote is an aggregate estimate. If there were individualized assessments of the repairs performed to each stall, there is no evidence they were conducted by the contractor who would be in the best position to assess the relative work required for each. If the assessment was performed by the Parkade Board, there is no evidence that the Board had any experience in assessing the nature and extent of work required to repair the individual stalls. The best evidence on this issue is that the chosen contractor provided its services for an overall resurfacing without breaking down the cost for each stall. Subsequently allocating these resurfacing costs to the individual parking stall owners is expressly contrary to the CMA and the Parkade bylaws. In any event, there is no evidence of "any act or omission" of any individual owners as required under section 3.2(d).

[74] Further, I accept the evidence that former reserve fund studies included the parkade resurfacing as costs that were to be paid by the reserve fund.

[75] I find the repairs were the obligation of Parkade and the individual assessments were improper.

[76] The Plaintiffs seek repayment of $50,031 for the parkade resurfacing repairs. They ask that these amounts be repaid out of the Parkade reserve fund.

[77] The Defendants raise concerns related to the relief sought by Waterfront respecting the resurfacing repairs. They argue there is no evidence regarding which owners paid their invoices and remain outstanding. Further, they argue it is improper to repay such amounts out of the reserve fund and it is improper for the court to direct that the reserve fund study be amended to reflect any decision of the court.

[78] I agree with the Defendants that the *CPA* prohibits funds being taken from reserve funds for capital improvements unless authorized by special resolution or as necessary to comply with health, building, maintenance, and occupancy standards: *CPA* section 38(1). In this case, I find that the repairs to the parkade were not capital improvements. Rather, the resurfacing of pavement was maintenance. As maintenance, there is no issue with such amounts being paid out of the reserve fund.

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[79] More importantly, had Parkade followed its bylaws and resurfaced the parkade, the resurfacing costs would have and should have been properly accounted for in the manner set out in the CMA.

[80] In terms of an accounting related to which owners paid which invoices, while that information is not in evidence, it has not been suggested that the parties do not have the records needed to determine what amounts are subject to repayment.

[81] Having decided that the 2015 Parking Lot Assessment was improper, the financial impact of the assessment must be reversed to conform with the CMA. I will leave it to Parkade to decide where it will source the funds to allow for the reversal and meet its repayment obligations so as to reinstate the parties to the position in which they would have been had Parkade paid for the resurfacing and not issued the 2015 Parking Lot Assessment.

[82] I decline to make any direction regarding the 2021 Clear Path Engineering Reserve Fund Study. I agree with the Defendants that the reserve fund is prepared by professionals in accordance with the *CPA*. However, it would seem obvious that the failure of the Parkade Board, and perhaps future reserve fund study professionals, to apply the bylaws in a manner consistent with this Court's ruling could result in Parkade having insufficient funds on reserve when the next repairs are required.

2016 Special Assessment

[83] Parkade issued the 2016 Special Assessment against the owners of Waterfront. Waterfront paid the 2016 Special Assessment under protest to avoid the 18% interest Parkade sought to impose and to prevent the registration of charges.

[84] I agree that the CMA expressly addresses the amounts included in the 2016 Special Assessment including those related to garbage collection and costs for snowmelt and heated sidewalks.

[85] Garbage collection is expressly addressed in section 5 of the CMA which provides in part that, "[i]n addition to the foregoing, the parties agree that [Parkade] operates the common garbage disposal facility on behalf of [Hall, Waterfront] and itself and the cost of its operating such facility will be shared amongst the parties in accordance with clause 4(d) above."

[86] Section 4(a) of the CMA specifically contemplates that Parkade "agrees to be responsible for administration, maintenance, management and control (inclusive of cleaning and debris and snow removal) of the grounds and surface facilities." This is consistent with the Parkade bylaws at sections 4.2(a), (c), and (h).

[87] I agree that the provisions of section 4(a) of the CMA include amounts associated with maintenance costs related to such services. Therefore, the repair of the heated sidewalk would be included in the costs of maintenance for snow removal.

[88] As it relates to fire alarm and security monitoring, 38% of Hall's costs were allocated to Waterfront retroactive to 2002. The Defendants argue that the fire alarm and security monitoring assessment was proper. Specifically, they note that Hall had been invoiced for the majority of fire and security monitoring charges notwithstanding there was a central monitoring panel located in Hall which is connected to and receives reports from the subpanels located in Waterfront.

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[89] The Plaintiffs argue the Defendants had no authority to allocate these costs as the bylaws of Hall and Waterfront make clear that each respective Condominium Corporation is responsible for the maintenance of their own fire alarms and security systems. Indeed, as the Defendants rightfully acknowledge, the bylaws of Hall and Waterfront contemplate the provision of these services. The Defendants provide no basis for the allocation of the fire alarm and security systems to Waterfront. Given that the bylaws of Waterfront at section 4(c) and 4(i) and the Hall bylaws at sections 4.2(c) and 4.2(h) all contemplate that each respective Condominium Corporation is responsible for the maintenance of its own fire alarm and security systems, I see no basis for the assessment.

[90] For the above reasons, I find the assessment for the fire alarm and security systems was improper. As with my other rulings, these charges are to be reversed and the amounts repaid.

Is the 2016 Special Assessment Statute Barred?

[91] Having found the 2016 Special Assessment improper, there is no need to address the limitation arguments.

[92] Had I not determined the Special Assessment was improper, I would have held that any expenses prior to May 30, 2014, included within the Special Assessment was statute barred.

[93] The *Limitations Act*, RSA 2000, c L-12, provides:

> Limitation periods
>
> 3(1) Subject to subsections (1.1) and (1.2) and sections 3.1, 3.2 and 11, if a claimant does not seek a remedial order within
>
> > (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
> >
> > > (i) that the injury for which the claimant seeks a remedial order had occurred,
> > >
> > > (ii) that the injury was attributable to conduct of the defendant, and
> > >
> > > (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding, or
> >
> > (b) 10 years after the claim arose,
>
> whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

[94] The 2016 Special Assessment was passed by the Parkade Board on May 30, 2016. At that time, the Parkade Board made the decision to revisit the allocations of costs incurred in prior years.

[95] The legal issue is how far back in time the Board can go when reallocating the costs. Parkade knew or ought to have known what costs it was incurring and how it was allocating those costs between Hall and Waterfront. Parkade did so year after year until the Board decided to change the manner of allocation in May 2016. For Parkade to recover a greater share from Waterfront than it had paid is a claim that falls under the provisions of section 3(1) of the

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Limitations Act. Parkade failed to seek a remedial order for costs incurred before May 30, 2014, and therefore any such remedy is now barred by this provision.

Conclusion

[96] I grant judgement in favour of the Plaintiffs and direct the accounting and repayment in accordance with my directions above.

[97] The parties may speak to costs within 30 days.

Heard on the 12th day of September, 2023, with written submissions received on the 13th day of October, 2023, and the 3rd and 10th of November, 2023.

Dated at the City of Calgary, Alberta this 27th day of February 2024.

B.B. Johnston
J.C.K.B.A.

Appearances:
Shane B. King
for the Plaintiffs

Taryn C. Burnett, KC
for the Defendants

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