SUPREME COURT OF YUKON

Citation: Whitehorse Condominium Corp. No. 95 v. 37724 Yukon Inc., 2014 YKSC 7

Date: 20140210
S.C. No. 13-A0120
Registry: Whitehorse

Between:

WHITEHORSE CONDOMINIUM CORPORATION NO. 95

Plaintiff

And

37724 YUKON INC.

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

James Tucker and Kelly McGill — Counsel for the Plaintiff
Daniel Bennett and Meagan Lang — Counsel for the Defendant

REASONS FOR JUDGMENT
(Condominium Fees)

INTRODUCTION

[1] Whitehorse Condominium Corporation No. 95 (the "Condo Corp.") applies for judgment in summary trial against 37724 Yukon Inc. (the "Condo Developer") for condominium fees in the amount of $1,009,289.29 owing between October 19, 2005 and December 31, 2012, plus interest in the amount of $950,422.04 and penalties in the amount of $22,225.

[2] The Condo Corp. claims relief starting in 2005 because the Condo Developer owned all the units prior to and during construction and before their sale to third parties. The Condo Corp. has included in its calculation Unit A, a large unit whose development

has been the source of controversy. The fee calculation also includes Unit 61 (the "Clubhouse"), which is a common element.

[3] The Condo Developer admits that it is currently the owner of Units 60, 68, 71, 72, 76, 78, 79, 80, 81 and 86 and that it has not paid any condominium fees to the Condo Corp. on any units prior to December 31, 2012. Per the bylaws and declaration, the Condo Corp. is to assess unit fees on an annual basis, and the Condo Developer also admits that it is obligated to pay to the Condo Corp. its fees on the first day of the month following the receipt of the assessment. The Condo Developer denies that it is obligated to pay any retroactive condominium fees as it has not received any assessment or budget. It raises other defences in the alternative.

[4] Another issue is if and when the Condo Developer controlled the Condo Corp., and whether there was an agreement or an understanding not to charge condominium fees to the units owned by the Condo Developer until they were sold to third parties. If there was such an agreement or understanding, the Condo Corp. may be estopped from retroactively charging condominium fees, interest and penalties.

[5] Alternatively, the Condo Developer submits that the Condo Corp. is limited to collecting the proportionate share of the budgets prepared by the Condo Corp. for each year of operation.

[6] The Condo Developer claims that there is no jurisdiction to charge penalties and interest or assess them retroactively. The Condo Developer also claims for relief pursuant to s. 13 of the *Judicature Act*, R.S.Y. 2002, c. 128.

[7] The Condo Corp. has liened each of the units owned by the Condo Developer in the global amount of the condominium fees claimed ($1,965,110.68). The Condo Developer seeks an order declaring the liens invalid. The Condo Developer further

submits that the claim for some of the condominium fees is beyond the relevant limitation period.

[8] In this decision, the terms “condominium fees” and contributions to “common expenses” are used interchangeably and refer to the collection of money for common expenses set out in s. 14 of the *Condominium Act*, R.S.Y. 2002, c. 36 (the “*Act*”).

BACKGROUND

[9] Some of the context for this condominium fees case may be found in previous judgments cited as *Whitehorse Condominium Corporation No. 95 v. 37724 Yukon Inc.*, 2013 YKSC 4 and *Whitehorse Condominium Corporation No. 95 v. 37724 Yukon Inc.*, 2014 YKSC 2. Some of the findings of fact in these two decisions are relevant to the case at bar.

[10] The Condo Developer was incorporated in 2004 to develop a condominium housing project known as Falcon Ridge. The directing principals of the Condo Developer were Duncan Lillico and Brian Little. Brian Little was the president and a director of the Condo Developer. Duncan Lillico was a director.

[11] The original declaration and plan filed in the Land Titles Office in October 2005 (the “2005 declaration and plan”) created 54 single-family units leaving a large portion of Falcon Ridge described as common property. However, the Condo Developer proceeded with a phased development that went beyond the 54 units.

[12] Between 2005 and 2012, the Condo Developer built and owned 86 single-family units. Each of the single-family units was owned by the Condo Developer for varying periods of time before a single-family home was constructed on it and then sold to a third party.

[13] Despite the explicit requirement of section 6 of the 2005 Declaration that each owner, including the Declarant (i.e. the Condo Developer) “shall pay” its proportionate share of the common expenses, the Condo Developer has never paid any condominium fees for the units it has owned. Section 6 states:

> Each Owner, including the Declarant, shall pay to the Corporation his proportionate share of the common expenses, if any, as may be provided for by the Bylaws of the Corporation and the assessment and collection of contributions toward the common expenses may be regulated by the board pursuant to the Bylaws of the Corporation.

Control of the Condo Corp.

[14] The Condo Corp. was created on October 19, 2005, by the registration of the 2005 declaration and plan. Pursuant to the Bylaws of the Condo Corp. which were drafted by the Condo Developer, Duncan Lillico and Brian Little were the first directors of the Condo Corp. and were to hold office until the first meeting of the elected Board of owners. The mailing address in the 2005 Declaration is 10 Boss Road, which was the address of the personal residence of Lillico at the time.

[15] At the creation of the Condo Corp., all 56 units were held by the Condo Developer. As the single-family units were built and sold, the unit owners received a .74% share of the voting rights. As detailed below, a Board consisting of unit owners was elected in December 2007, however, all decisions regarding fees and expenses continued to be made by the Condo Developer.

[16] In 2005, Lee Nunn, the bookkeeper for the Condo Developer, provided bookkeeping services to the Condo Corp. as part of his duties for the Condo Developer. Lillico and Little provided instructions to Nunn to charge condominium fees in the amount of $80 to each new owner in December 2005 and deposit them in the Condo

Corp. bank account. The mailing address for the Condo Corp. bank account was the same personal residence of Lillico. The signing authorities were Lillico and Little until July 2006, when Lillico moved away from the Yukon and Little became the sole signing authority for the Condo Corp. until December 2007.

[17] The evidence of Nunn is that from 2005 to June 30, 2011, he continued to receive instructions from Little or Lillico on the condominium fees and payment of expenses. Nunn was added as signing authority on the bank account in December 2007 and signed all the cheques from December 12, 2007 to June 2011, when the executive of the Condo Corp. were added as signing authorities. Lee Nunn states:

> 9. In or about December of 2007, Little added my name as a signing authority on the [Condo Corp.] Account and I signed all cheques which were written on the [Condo Corp.] Account between December 12, 2007 and June of 2011. During that period of time, I was providing financial information to the individuals who had been elected to the Board of Directors for [the Condo Corp.], but I was receiving instructions from Little and Lillico with respect to the payment of expenses, and I continued to receive instructions from Little and Lillico in that regard until June 30, 2011.
>
> 10. In June of 2011, the members of the executive of [the Condo Corp.] were added as signing authorities on the [Condo Corp.] Account.

[18] There is no doubt that the Condo Developer controlled the Condo Corp. from 2005 to December 2007. Little states that from 2005 forward, the Condo Developer held the majority of votes, although it had never exercised its majority voting power in any vote.

[19] However, by June 2006, there were issues between the Condo Developer and single-family unit owners. In a letter to Lillico, 13 resident owners raised the following concerns:

1. None of the 13 resident owners had seen a site plan or landscape plan which they considered an “unacceptable” situation;
2. A fencing questionnaire sent by email did not reach all owners;
3. The spring flooding from snowmelt was “totally unacceptable”;
4. They demanded an “initial formal public meeting” with the Condo Developer and regular monthly meetings;
5. They requested notice of the meetings on a public notice board.

[20] Lillico commented in an internal email that the letter was only signed by 13 of 29 Falcon Ridge residents, two of whom were in arrears on their condominium fees. He also stated:

1. The landscaping plan is a developer’s cost and is a “living document” requiring changes as problems are encountered;
2. While being flexible on fence design, it is a developer’s cost and “we have the right to do whatever we want”;
3. He agreed to “smooth” the grading on the spring melt flooding;
4. Community meetings will slow down the entire development process;
5. The notice board should wait for the Clubhouse to be built.

[21] Lillico concluded the email with the notation that the Condo Developer had “the majority vote with ownership of about 70% of the voting rights if I recall correctly”.

[22] I infer from this statement that Lillico was not basing his “majority vote” on the 54 single-family units reflected in the declaration and plan, but also on the remaining property in the Falcon Ridge development owned by the Condo Developer, most notably including what is now Bare Land Unit A.

[23] I also find as a fact that the amendments to the 2005 declaration and plan on May 2, 2007, April 22, 2008 and April 26, 2012, to all intents and purposes maintained the “majority vote” of the Condo Developer on the Condo Corp. The fact that these amendments were subsequently declared invalid in the injunction decision does not detract from the “majority vote” position put forward by the Condo Developer with respect to its control of the Condo Corp. at the relevant times.

[24] Caitlin Kerwin was the President of the Condo Corp. from her election in December 2007 to April 2012. She states that Little and Lillico told the Board of Directors that the Board had no authority to enter contracts or manage the finances, including the collection of condominium fees which was controlled by Little and Lillico. In fact, Kerwin states that she and the Board of Directors were unaware of any assessments performed with respect to common expenses until 2011, when the Condo Corp. increased the condominium fees to $190 per month. Kerwin described the role of the Board of Directors as follows:

> Between December of 2007 and the beginning of 2011, the elected Board of Directors of [the Condo Corp.], of which I was the President, did not consider itself as having actual control of the affairs of [the Condo Corp.], such that it referred to itself as the “Board in Waiting”. We felt that way because Brian Little and Duncan Lillico made most of the decisions concerning the business and affairs of [the Condo Corp.].

[25] In or about the fall of 2010, in the context of further development of Falcon Ridge, Kerwin states that Little told her that the Condo Developer controlled the majority of votes in the Condo Corp. and could construct whatever it saw fit.

[26] The Condo Developer constructed and furnished the Clubhouse in or about December 2007. The Clubhouse was marketed as being for the owners’ use and

enjoyment and it was used by the owners as common property starting in October 2008. However, the Condo Developer retained title to the Clubhouse from September 13, 2007 until December 13, 2010, at which time Clubhouse was transferred to the Condo Corp. The Condo Corp. had previously requested the transfer of the Clubhouse as it was unable to insure it until it was the registered owner.

[27] Kerwin and the Board of Directors of the Condo Corp. were understandably anxious to have the title to the Clubhouse transferred from the Condo Developer to the Condo Corp. Kerwin states that Lillico tied the transfer of the Clubhouse to the Condo Corp.'s support of further construction proposed by the Condo Developer. Her assessment is confirmed by this email exchange which commences with Kerwin's request to transfer the Clubhouse and Lillico's response:

> [Kerwin] Thank you for the opportunity to comment, we hope our input will be given full consideration and look forward to working with you as the project moves ahead. Please contact me once the condo transfer is done as we'd like to resolve the insurance coverage issue ASAP and can't do so until we have legal title.
>
> [Lillico] I would like to get the condo transfer done as well. The paperwork is ready for submittal, I just want to ensure we are on the same side moving forward. I don't want a situation where I sign over the condo building and all of a sudden when construction starts people are picketing or doing "sit ins" or something else designed to affect my ability to move forward.

[28] I find this exchange confirms that the Condo Developer very much exercised control of the Condo Corp. and was prepared to hold up the transfer of the Clubhouse to ensure agreement to its development proposal.

[29] Helen Booth, the current president of the Condo Corp. states that the first Board of Directors for the Condo Corp. was elected in December 2007, but did not have full

control of the Condo Corp.'s business affairs, finances or bank accounts until June 2011. Brian Little generally agrees with this and indicates that the Board of Directors referred to themselves as the "board-in-waiting" because of certain unresolved issues like the City of Whitehorse water bill. Little claims that the Board of Directors formally took over in December 2010.

[30] I prefer the evidence of Nunn, Booth and Kerwin and find that the Condo Developer maintained the financial control of the Condo Corp. up until June 2011, in particular with respect to the setting, collection and spending of condominium fees.

The Payment of Condominium Fees by the Condo Developer

[31] Brian Little, on behalf of the Condo Developer, states that it had an "understanding" with the Condo Corp. that it would not pay any condominium fees until units were sold or leased. He expressed it this way:

> Prior to November 2012, [the Condo Corp. and the Condo Developer] had agreed that [the Condo Developer] was not required to pay condominium fees. [The Condo Developer] understood that its units would not be assessed condominium fees until they were sold or leased. This position was based on the shared understanding that unused units did not create "any expense for [the Condo Corp.]".

[32] There is no evidence that supports the contention that the Condo Corp. made an explicit agreement or had an understanding that condominium fees would not be charged to the units owned by the Condo Developer. Indeed, such an agreement or understanding would have been unnecessary as the Condo Developer controlled the assessment and collection of condominium fees from 2005 to 2011.

[33] There is evidence that supports the Condo Developer's understanding that it would not pay condominium fees until the single-family units were constructed and either sold or leased.

[34] The evidence of Nunn is instructive on this issue:

> 3. On the instruction of Lillico, [the Condo Corp.] began charging condominium expenses to the individuals who had purchased condominium units in December of 2005. At that time, the individuals who had purchased units in [the Condo Corp.] were charged common expenses from the rate of $80.00 per month. Lillico instructed me to collect the common expenses from the individuals who had purchased units in [the Condo Corp.] and deposit the collected common expenses to account # 100-771-5 at the Royal Bank of Canada, ("[the Condo Corp.] Account"), …
>
> 6. Throughout 2006 and 2007, on the instruction of Lillico and Little, I continued to collect condominium expenses from the individuals who purchased units in [Condo Corp.]. When units were sold during that time, Little would typically inform me of the sale and instruct me to collect condominium expenses from the purchasers. …

[35] Little states that an email dated June 14, 2012, from Nunn supports its view that the Condo Developer did not have to pay condominium fees. Nunn set out his understanding of the payment of condominium fees in answer to an inquiry from a Legal Assistant in the office of the Condo Developer's lawyer:

> It is my understanding that new units are being occupied as soon as they are completed. So the premise I am going by is that the new owner would start paying condominium fees [to] the [Condo Corp.] when they take possession of the unit on a prorated basis for the days remaining in the month.
>
> The developers wouldn't owe any condo fees, unless a unit doesn't sell and they decide to rent it out. Once a unit is occupied, condominium fees are triggered.
>
> I think that is the fair way to do it. We couldn't charge the developer condominium fees on an unfinished unit and we

> have no way of knowing when a unit is finished until someone starts living there.
>
> So on the statement of adjustments it would just be the purchaser that would pay for the days left in the month.

[36] Nunn's filed affidavit refers to this email as follows:

> 2. I have reviewed the email which is attached as Exhibit "F" to the affidavit of Brian Little sworn the 1st day of October, 2013 in S.C. No 12-A0120. I was the author of that email. I wrote that email only in the context of keeping track of condominium fees. When I wrote that email, it was not intended as a representation that [the Condo Developer] would not have to pay condominium fees to [the Condo Corp.], and I was certainly not authorized to make any such representation on behalf of [the Condo Corp.].
>
> 3. At the time when I wrote the email attached as Exhibit "F" to the affidavit of Brian Little, sworn the 1st day of October, 2013, I had no way of knowing who I should be billing for condominium fees [unless] I was told by [the Condo Developer] or by Glenda Murrin, their conveyancing attorney. This was a frustration of mine because [the Condo Developer] felt that I should be on top of collecting the fees, but I was not updated on a regular basis, so I was guessing most of the time. As I stated in the email, when I wrote it, I was simply using my best judgment with respect to how to keep track of the condominium fees.

[37] The Condo Developer also relies upon the issuance of Condominium Certificates, which it refers to as "estoppel certificates" to establish its understanding that it was not required to pay condominium fees. These certificates are assurances from the Condo Corp. to a purchaser that there are no outstanding obligations or charges against the unit that a purchaser is buying. The only example provided was a Condominium Certificate dated April 24, 2005, presumably signed by Duncan Lillico, which stated:

> To whom it may concern, it is hereby certified with respect to Unit No. 5, Condominium Corporation No. 95-58 Falcon Drive, Whitehorse, Yukon Territory, (the "Unit") that :

> 1. The subject Unit is not subject to any outstanding common expense levies or assessments of the Corporation (see attached Status of Fees and Assessments Sheet). Current assessments for the Unit are $150.00 per month. The subject Owner has fulfilled all his obligations in connection with the project and/or his Unit. The Corporation does /does not have a lien registered against the Unit for unpaid assessment.
>
> …

[38] I find from the evidence that there was no agreement between the Condo Corp. and the Condo Developer that the Condo Developer was not required to pay condominium fees. There was clearly a practice by the Condo Developer not to charge itself condominium fees when it was in *de facto* control of the Condo Corp. However, this practice is in direct conflict with the 2005 Declaration that the Condo Developer "shall pay to the Corporation his proportionate share of the common expenses …"

[39] The fact that the practice of not charging condominium fees was initiated and acted on by the Condo Developer cannot override the clear mandatory obligation in the 2005 Declaration. The Condo Developer is not assisted by its use of the Condominium Certificate which primarily relieves a purchaser from common expenses, common levies or assessments arising before the purchase of a unit. I conclude that there is no evidence supporting the position that there was an agreement by the Condo Corp. Board that the Condo Developer did not have to pay condominium fees. The view expressed by Nunn may support the practice of the Condo Developer but it is not authorized by or binding upon the Condo Corp.

[40] I do not find any basis on which an argument of promissory estoppel or estoppel by representation or convention could succeed.

Condominium Fees Owing

[41] The Condo Corp. has a duty to effect compliance with the *Act*, the declaration and the bylaws as expressed in s. 13(1) of the *Act*:

> 13(1) Each owner is bound by, shall comply with and has a right to the compliance by the owners with this Act, the declaration and the bylaws, and the corporation has a duty to effect that compliance.

[42] The Condo Corp. has mandatory obligations with respect to common expenses in the *Act*:

> 14(1) The corporation shall
>
> > (a) establish a fund for the payment of the common expenses, to which fund the owners shall contribute in proportions specified in the declaration;
> > (b) assess and collect the owners' contributions towards the common expenses as regulated by the declaration and the bylaws;
> >
> > (c) pay the common expenses;
> >
> > …

[43] Common expenses are defined in the *Act* as follows:

> “common expenses” means the expenses of a performance of the objects and duties of a corporation and any expenses specified as common expenses in a declaration or in section 5;

[44] The only applicable subsection of s. 5 of the *Act* relates to the required contents of a declaration and states:

> …
>
> (g) it contains a statement expressed in percentages allocated to the units of the proportions in which the owners are to contribute to the common expenses and to share in the common interest; and
>
> …

[45] In this Condominium Declaration, common expenses are defined as “the conservation, maintenance and administration of the common portions and related expenses including maintenance of roads, costs of electricity, water, heating and fuel in the common portions, employee wages, furnishings and equipment, legal accounting and insurance costs as well as costs of borrowing”.

[46] Section 2 of the Condominium Declaration states the following:

> Each owner shall have an undivided interest in the common property elements as a tenant in common with all other owners and each owner shall contribute to the common expenses in proportion to the percentage of the common property elements as expressed in the certificate of title of each owner.
>
> The proportion of the undivided interest in the Common Elements and the contribution to the common expenses that is allocated to each unit is as set forth in Schedule “A” attached hereto. The total of the proportions of the common interests shall be One Hundred percent (100%).

[47] The Bylaws set out the following detail:

> **ARTICLE XI. ASSESSMENT AND COLLECTION OF COMMON EXPENSES**
>
> 1. **Duties of the Board**: All expenses, charges and costs of maintenance or replacement of the common elements and any other expenses, charges or costs which the Board may incur or expend pursuant hereto shall be assessed by the Board and levied against the owners in the proportions in which they are required to contribute to the common expenses as set forth in the Declaration. The Board shall establish a fund for the purpose of payment of the common expenses and shall collect from each owner’s contribution towards the common expenses and pay same. The Board shall from time to time and at least annually prepare a budget for the property and determine by estimate the amount of common expenses for the ensuing fiscal year or remainder of the current fiscal year as the case may be. The Board shall allocate and assess such common expenses as set out in the budget for such period among the

> owners, according to the proportion in which they are required to contribute to the common expenses as set forth in the Declaration. In addition, the Board shall provide in the annual budget a reserve fund for contingencies, working capital, deficits or replacements, which reserve fund shall be an asset of the Corporation. The Board shall advise all owners promptly in writing of the amount of common expenses payable by each of them respectively determined as aforesaid, and shall deliver copies of each budget on which such common expenses are based, to all owners and mortgagees entered on the register.
>
> 2. **Owners' Obligations**: Each owner shall be obliged to pay to the Corporation or as it may direct the amount of such assessment in equal monthly payments on the first day of each and every month next following delivery of such assessment until such time as a new assessment shall have been delivered to such owner. (my emphasis)

[48] Section 14 of the *Act* requires that a condo corporation establish a fund for the payment of the common expenses "to which fund the owners shall contribute in proportions specified in the declaration."

[49] In this case, the 2005 Declaration states that each owner shall contribute to the common expenses "in proportion to the percentage of the common property" that is allocated to each unit in Schedule A attached to the Condominium Declaration.

[50] On reviewing the legislative provisions of the *Act*, there is no doubt that the Condo Corp. has the authority to establish a fund to pay common expenses and assess contributions according to the owners' contributions set out in by the declaration and the bylaws.

[51] The first issue raised by the Condo Developer is that the Condo Corp. has no jurisdiction to assess fees other than in accordance with the *Act*, the Declaration and the Bylaws, and cannot therefore assess fee retroactivity in this action.

[52] The *Act,* Declaration and Bylaws require the Condo Corp. Board to do the following:

a) Prepare a budget and determine by estimate the amount of common expenses;

b) Allocate and assess the common expenses according to the contribution allocated to each unit owner in the Declaration; and

c) Advise each owner of their share of the common expenses and deliver copies of the budget to each owner and encumbrancer.

[53] I find the submission of the Condo Developer is somewhat disingenuous to the extent that the Condo Developer has controlled the Condo Corp. from 2005 to 2011 and there is no evidence that it followed the exact procedure set out in the Bylaw. Furthermore, it is the Condo Developer that saw fit to not charge itself common expenses in direct contradiction of the 2005 Declaration.

[54] The Condo Developer relies on the decision in *Condominium Plan No. 822909 v. Francis*, 2003 ABCA 234 (the "*Francis* case"). In that case, the developer who also controlled the corporation agreed to provide a 65% rebate to the owners of townhouses as opposed to traditional high-rise units. This, in practice, meant that the townhouse owners paid only 35% of the fees required by their unit allocation. In finding this practice to be contrary to the *Act* and *ultra vires* the corporation, Ritter J.A. stated at para. 24:

> This scheme can only be perceived as a thinly-veiled attempt to have the townhouse unit owners pay fees on a basis other than unit holdings. The by-law makes it clear that the whole purpose was to address the perceived inequality created by unit factor assessment of fees relating to the utility and garage issues. The duration of the rebate agreement is, for all practical purposes, for the useful life of the project. The manner of payment reflects payment of fees

> on a basis other than unit factors. I therefore conclude that the scheme does not comply with s. 31 of the Act.

[55] In my view, the *Francis* case is distinguishable from the facts in the case at bar. Here, the Condo Developer has attempted to circumvent the *Act*, Declaration and Bylaws from 2005 to date by not paying its share of common expenses. Rather than establishing a common expense allocation that circumvents the Declaration, the Condo Corp. is simply attempting to do its statutory duty to require all unit owners to pay their proper allocation of common expenses. The principle in the *Francis* case actually applies against the Condo Developer. Even assuming there was an agreement or understanding between the Condo Corp. and the Condo Developer (which I do not find as a fact), it would not be in compliance with the *Act* as it creates an inequality in the charging of condominium fees in favour of the Condo Developer and contrary to the interests of the other unit owners.

[56] The Condo Developer also submits that the Condo Corp. assessment is somehow retroactive and to that extent unfair. I do not agree. In this case, the obligation to pay its share of the common expenses always existed but was conveniently disregarded by the Condo Developer. See *D.B.S. v. S.R.G.,* 2006 SCC 37, at para. 67.

[57] The Condo Developer also takes issue with the fact that the Condo Corp. has not followed the precise requirements of the Bylaws in that it has not delivered a budget or assessment in any year from 2005 to 2012. This submission is true in that the Condo Developer controlled the Board of the Condo Corp. and did not formally deliver the budget and assessment to itself. However, even if one assumed that such a failure invalidated a common expense obligation (and I have found no authority for that proposition) it would not apply in this circumstance where the Condo Developer not only

had knowledge of the annual budget and assessments but also controlled the process of creating them. The Condo Developer cannot rely upon its failure to follow the correct procedure to avoid its common expense obligation.

[58] Alternatively, counsel for the Condo Developer submits that its condominium fees must be assessed on its proportionate share of each year's actual expenditures rather than the per unit fee paid by the unit owners that were charged. The Condo Corp. takes the position that the Condo Developer should pay the $80 per unit per month assessed for 2005 and 2006, the $150 per unit per month in 2007, 2008, 2009 and 2010 and the $190 per unit per month assessed in 2011, which results in a payment of $1,009,289.29. The Condo Developer says a more appropriate resolution would be for the Developer to pay its proportionate share of the actual annual expenses and not the per unit fee, as the Condo Corp.'s proposal would result in a clear windfall to it. The only estimated annual budgets are the proposed budgets for 2012 and 2013, after the Condo Developer relinquished control of the Condo Corp. to the Board of Directors. In the proposed 2012 budget, the income was $136,800 and the actual expenses were $82,903.92. The proposed budget for 2013 had an income of $136,800 and actual expenses of $178,223.02.

[59] Counsel for the Condo Developer submits it would be unfair to go back to 2005 and recreate the estimated budget based on the per unit fee charged as it would have little, if any, relationship to the actual expenses at the time. He argues that paying a proportionate share of the actual budget expenses would permit the Condo Corp. to recoup actual common expenses. This proposition is somewhat clearer in the following table prepared by counsel for the Condo Corp.:

	Condo Corp.'s Proposed Annual Budget	Actual Annual Budget	Actual Expenses	Actual Equity
2005	$25,945.94	$480	0	$480
2006	$129,729.72	$18,710	$12,057.80	$7,132.20
2007	$177,027.02	$65,675	$54,075.48	$23,568.81
2008	$243,243.24	$100,930	$49,282.87	$80,273.51
2009	$243,243.24	$107,850	$85,199.17	$103,772.73
2010	$308,108.04	$136,610	$79,837.58	$162,149.52
2011	$308,108.04	$136,800	$82,903.92	$215,695.50
2012	$308,108.04	$136,800	$178,223.02	$180,356.31

[60] In my view, there is some merit to this submission as it reflects more realistically the contribution that would have been required from the Condo Developer with respect to common expenses. In other words, had the Condo Developer paid its proportionate share of actual expenses, the condominium fee per unit would have been lower. I agree that the Condo Corp.'s calculation based upon the actual condominium fee charged per unit creates a windfall of sorts, although I appreciate that the use of the word "windfall" is not entirely appropriate as I am sure the Condo Corp. would be happy to increase its fund for future contingencies and charge the Condo Developer the condominium fees paid by the other unit owners at the time.

[61] At first blush, the Condo Developer's proposal may also appear unfair to the owners who paid the full condominium fees over those years. However, that apparent unfairness could be rectified by an appropriate rebate or be added to the contingency reserve.

[62] I agree with the assessment of Proudfoot J. as approved by Thackray J. in *Strata Plan 1261 v. 360204 B.C. Ltd*., [1995] B.C.J. No. 2761 (S.C.), at para. 100, that the position of owner-developer remains a fiduciary one and he is under a duty to protect

the interests of all owners. In addition, s. 12 of the *Judicature Act* empowers this Court to grant any remedies whatsoever that any party may appear to be entitled to in respect of a legal or equitable claim.

[63] I conclude that the proportionate share of actual common expenses incurred is the amount that the Condo Developer should pay the Condo Corp. Applying the proportionate share approach to the Condo Developer's contribution to common expenses reduces the obligation of the Condo Developer to $394,212.79 by the calculation of counsel for the Condo Developer. Counsel for the Condo Corp. is at liberty to challenge this calculation if it is inaccurate. As I understand it, if this submission is adopted there is also no need to consider the issue of whether the Condo Corp. has included fees for the Clubhouse or Unit A, as the figure of $394,212.79 is a global figure not based upon the actual condominium fee assessed per unit.

[64] In my view, this calculation is fair to both the Condo Developer and the unit owners. It is not fair and equitable to recreate the proposed budgets from 2005 to 2011 and the actual budgets are the most realistic basis. It is fair to the unit owners who perhaps paid more than they should have if the amount owing by the Condo Developer could be used to rebate past condominium fees of unit owners, create a reserve, or both. In this way the Condo Developer is accountable to the unit owners without creating a windfall that would be unfair or excessive compared to the actual expenses incurred.

The Limitation Period

[65] Counsel for the Condo Corp. submits that there is a 10-year limitation period for recovery of condominium fees pursuant to s. 11(1) of the *Limitation of Actions Act*, R.S.Y. 2002, c. 139, which states:

> No proceedings shall be taken to recover any rent charge or any sum of money secured by any mortgage or otherwise charged on or payable out of any land or rent charge or to recover any legacy, whether it is or is not charged on land, or to recover the personal estate or any share of the personal estate of any person dying intestate and possessed by their personal representative, but within 10 years next after a present right to recover it accrued to some person capable of giving a discharge therefor, or a release thereof, … (my emphasis)

[66] This would permit recovery of the $394,212.79.

[67] Counsel for the Condo Developer submits that there is a six-year limitation period based upon s. 2(1)(f) of the *Limitation of Actions Act*, which states:

> actions for the recovery of money, except in respect of a debt charged on land, whether recoverable as a debt or damages or otherwise, and whether on a recognizance, bond, covenant, or other specialty or on a simple contract, express or implied, and actions for an account or for not accounting, within six years after the cause of action arose; (my emphasis)

[68] The six-year limitation period would further reduce the recovery of the Condo Corp. to $379,145.29.

[69] In my view, the 10-year limitation period is the correct one in this case. In the *Act*, in addition to requiring the corporation to establish a fund, assess, collect and pay common expenses, ss. 14(d), (e) and (f) create a right of lien enforceable like a mortgage against land. These subsections create a statutory action for debt coupled with a right of lien including the right to enforce the lien in the same manner as a mortgage under the *Land Titles Act*. It is in effect a debt charged on land and specifically excluded from the six-year limitation period in s. 2(1)(f) but covered in s. 11(1) setting out the recovery of money charged on land.

The Amount of the Lien per Unit

[70] The Condo Corp. has liened each unit owned by the Condo Developer for the entire amount of arrears of common expenses, interest and penalties. Counsel for the Condo Developer submits that s. 14(1)(e) of the *Act* can only be interpreted to permit the actual amount of common expenses to be charged against each unit. I agree with this submission as the statute specifically refers to “the unpaid amount” of an owner which can be liened against the unit and common interests of “the defaulting owner”.

[71] In *York Condominium Corp. No. 482 v. Christiansen* (2003), 64 O.R. (3d) 65 (S.C.), the central issue was whether the condominium corporation could impose a lien upon all the units owned by a particular owner, even though some of that owner’s units were not in arrears. Lane J., at paras. 23 and 24, concluded that the lien is confined to the arrears on the liened unit. He added a valid policy ground that permitting the whole amount of arrears to be liened against an owner who owned a number of units, some not in arrears, would upset the balance of fairness between the mortgagees. By the same token, it is unfair to the owner who may wish to sell a liened unit where the amount of the lien could exceed the value of the unit.

[72] I conclude that the liens filed that claim more than the actual arrears of the particular unit shall be discharged to the extent that the lien exceeds the arrears incurred on the particular unit. As this may require some further calculations or directions, counsel may address the matters in case management.

Penalties and Interest

[73] Section 14(1)(b) of the *Act* empowers the Condo Corp. to “assess and collect” the owners’ contributions toward the common expenses as regulated by the declaration and the bylaws.

[74] Section 5(1)(a) of Article XI in the Bylaws states:

> 5 Default in Payment of Assessment
>
> (a) Arrears of payments required to be made under the provisions of this Article XI which remain in arrears for more than seven (7) days shall result in a fine of $25.00 per event of default and, in addition, shall bear interest at the rate of eighteen (18%) per cent per annum and shall be compounded monthly until paid.

[75] I am satisfied that the words is s. 14(1)(b) of the *Act* to assess and collect common expenses "as regulated by the declaration and bylaws" empowers the Condo Corp. to assess fines and interest for arrears of payment as set out in s. 5(1)(a) of the Article XI in the Bylaws.

[76] It is another matter whether some relief should be granted to the Condo Developer pursuant to s. 13 of the *Judicature Act*:

> Subject to appeal as in other cases, the Court shall have power to relieve against all penalties and forfeitures and in granting that relief to impose any terms as to costs, expenses, damages, compensation, and all other matters as the Court sees fit.

[77] It may be legitimately argued that the conduct of the Condo Developer, in not assessing itself condominium fees, should disentitle it to equitable relief, particularly since it also drafted the Declaration. On the other hand, an 18% interest rate is significant in this economic climate of low interest rates. However, the Condo Developer was given notice by the Condo Corp. of its intention to collect some condominium fees by letter dated November 23, 2012, and the bulk of the arrears by letter dated January 6, 2013. That said, the amount of $394,212.79 was not established until the date of this judgment. In my view, it is appropriate that interest at the rate of 18% per annum compounded monthly commence on the date of this judgment.

[78] I relieve the Condo Developer from paying any penalty.

COSTS

[79] The Condo Corp. spent a significant amount of time and effort resolving this dispute, and although it may have overreached somewhat in the circumstances, it has had substantial success and should have its costs on Scale C.

DISPOSITION

[80] To summarize, I order that:

1. The Condo Developer pay the Condo Corp. the sum of $394,212.79 with interest at the rate of 18% per annum compounded monthly commencing on the date of this judgment.
2. The Condo Developer is relieved from paying the penalty on arrears.
3. The liens registered against the units of the Condo Developer be discharged to the extent the amount exceeds the proportionate share of $394,212.79 allocated to each unit. Counsel may speak to the calculation of this amount in case management if there is disagreement.
4. Costs shall be granted to the Condo Corp. against the Condo Developer on Scale C.

[81] I reserve the right to give further reasons as may be required.

VEALE J.