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Docket: CA 163846

CA 163847

NOVA SCOTIA COURT OF APPEAL

[Cite as:2475813 Nova Scotia Ltd. v. Rodgers, 2001 NSCA 12]

Bateman, Hallett and Cromwell, JJ.A.

BETWEEN:

RITA M. RODGERS, et al.

Appellants
Respondents by Cross-Appeal

- and -

2475813 NOVA SCOTIA LIMITED

Respondent
Appellant by Cross-Appeal

AND BETWEEN:

INTAB ALI et al.

Appellants
Respondents by Cross-Appeal

- and -

BRUCE BRETT, 2475813 NOVA SCOTIA LIMITED, CHARLES HENMAN, PAMELA ROBERTSON, BETTY SINNIS and ROBERT THOMSON

Respondents
Appellants by Cross-Appeal

- and -

HALIFAX COUNTY CONDOMINIUM CORPORATION NO. 151

Respondent

REASONS FOR JUDGMENT

Counsel:	David A. Copp and Janet H. Morris for the Appellants (Respondents by Cross-Appeal) Intab Ali, et al Dennis James and Paul Morris for the Respondents (Appellants by Cross-Appeal)
Appeal Heard:	November 20, 2000
Judgment Delivered:	January 24, 2001
THE COURT:	Appeals allowed and cross-appeal dismissed per reasons for judgment of Cromwell, J.A.; Hallett and Bateman, JJ.A. concurring.

CROMWELL, J.A.:

I. Introduction:

[1] This case concerns a proposed sale of a condominium development. One person, Mr. Brett, effectively controls 80% of the votes of all unit owners. He was also the controlling mind of the developer and a director of the condominium corporation. By exercising his 80% voting control, Mr. Brett has obtained the authorization necessary to require the sale of the condominium to a company under his control at a price of his choosing. There is a group of dissenting unit owners who, if the transaction proceeds, will be required to sell their units against their will. Their position is that the proposed transaction has not been properly authorized. While the appeal raises several interpretative and procedural issues under the **Condominium Act**, the fundamental question is this. Does the **Act** permit a person controlling 80% of the votes to purchase the condominium property, dispossess all of the unit holders and dictate the terms of the sale over the dissent of the remaining unit holders?

[2] Before turning to the facts and issues, it will be helpful to set out an overview of the legal framework for the condominium out of which the specific questions to be answered on this appeal arise.

[3] The term “condominium” refers to a system of ownership and administration of property with three main features. A portion of the property is divided into individually owned units, the balance of the property is owned in common by all the individual owners and a vehicle for managing the property, known as the condominium corporation, is established: see A.H. Oosterhoff and W.B. Rayner, *Anger and Honsberger Law of Real Property* (1985), Vol. II, s. 3801 and Alvin B. Rosenberg, *Condominium in Canada* (1969). The condominium may be seen, therefore, as a vehicle for holding land which combines the advantages of individual ownership with those of multi-unit development: Oosterhoff and Rayner at s. 3802. In a sense, the unit owners make up a democratic society in which each has many of the rights associated with sole ownership of real property, but in which, having regard to their co-ownership with the others, some of those rights are subordinated to the will of the majority: see Robert J. Owens et al. (eds), *Corpus Juris Secundum* (1996), Estates § 195, Vol. 31, p. 260.

[4] As Oosterhoff and Rayner wisely observed, the success of a condominium depends in large measure on an equitable balance being struck between the independence of the individual owners and the interdependence of them all in a co-operative community. It follows, they note, that common features of

all condominiums are the need for balance and the possibility of tension between individual and collective interests: at s. 3802.

[5] From a more purely legal perspective, a modern condominium is created pursuant to detailed legislative provisions such as, in Nova Scotia, the **Condominium Act**, R.S.N.S. 1989, c. 85 (the "**Act**"). The condominium is, therefore, a creature of statute. But condominium legislation reflects the combination of several legal concepts and relies on, and to a degree incorporates by reference, principles drawn from several different areas of law. The law relating to individual ownership of real property is, of course, central because the owners of the individual units are, subject to certain limits, entitled to exclusive ownership and use of their units: see s. 27(2) of the **Act**. The law relating to joint ownership is significant because the owners are tenants in common with respect to the common elements: see s. 28(1). The law relating to easements and covenants is relevant because the unit owners have rights to compliance by the others with the provisions governing the condominium and certain easements are, by statute, appurtenant to each unit: see s. 30(2) and 29. The law relating to corporations is also of importance because the condominium is administered by the condominium corporation in which the unit holders are in a position

analogous to shareholders: see, e.g., ss. 13 and ff and s. 25. While the **Condominium Act** enables and, to a degree, regulates the legal aspects of condominium ownership, it does so against a vast background of general legal principles which will frequently be relevant to the interpretation and application of the **Act**. As has been said, "[i]n its legal structure, the condominium first combines elements of several concepts ... and then seeks to delineate separate privileges and responsibilities on the one hand from common privileges and responsibilities on the other." *Corpus Juris Secundum*, **supra** at p. 260.

[6] Not all condominium developments succeed or last indefinitely. The **Act** provides for termination and sale.

[7] Under s. 41, the owners may decide that the property will no longer be a condominium. To use the language of the statute, the government of the property by the **Act**, may be terminated. The effect of taking this step is that the property ceases to be a condominium, the unit owners become tenants in common and the condominium corporation is deemed to have been wound up: see s. 42(a) and (b) and s. 22. This step may only be taken if approved by all unit owners and registered encumbrancers or by court order: s. 41(1) and 43.

[8] Under s. 40 of the **Act**, the property, that is, all units and common elements, may be sold. When this step is taken, the government of the property is terminated and the owners share the proceeds of sale in the same proportions as their common interests: s. 40(3)(a) and 40(4). The practical effect is that individual owners are forced to sell their units. This step may be taken only with the approval of 80% of the unit owners and all registered encumbrancers: s. 40(1). Dissenting unit owners are afforded a measure of protection. They are given the right to have the fair market value of the property determined and, if this is greater than the sale price, all unit owners voting for the sale are liable for the deficiency: s. 40(5) and 40(6).

[9] Termination or sale of the condominium are fundamental steps which, when contemplated or pursued, are likely to escalate the inherent tension between individual and collective interests. And so it is in this case.

II. Overview of the Facts:

[10] Halifax Condominium Corporation No. 151 was registered on March 29, 1988. It is a 200 unit residential building known as Granbury Place. Brett Pontiac Buick GMC Limited, a company controlled by Bruce Brett, was the declarant-owner of the property. The project was developed and marketed through Granbury Developments Limited, another Brett company.

[11] Some initial sales of the units were made, but about 80 of the 200 units remained unsold and were acquired by another Brett company, 2475813 Nova Scotia Limited. It acquired additional units with the result that, as of January 12, 2000, that company owned or together with Mr. Brett, controlled, in excess of 80% of the units and common elements. Most of these units were rented. The appellants, who in the main occupy their units, owned roughly 14%.

[12] Since at least 1997, there have been disputes between the Brett interests and the appellants about the governance and future direction of the condominium. The Board of Directors of the condominium corporation made offers (the first being made in May of 1997) to acquire all the units owned by the Brett interests, but no agreement was reached. From roughly June of 1998, Mr. Brett undertook what he referred to as "... an extensive process of repurchasing units through 2475813 Nova Scotia Limited." The result of this process was that, according to Mr. Brett's disclosure statement in December, 1999, 2475813 Nova Scotia Limited owned 150 units and other persons related to Mr. Brett owned 13. He thus had effective control of just over 80% of the units.

[13] In December of 1998, Mr. Brett wrote to unit owners that "[i]rritations left in the body of unit owners which remain in the Corporation are of such a significance and to such an extent that I now conclude that the sole appropriate resolution of this matter is to move to a termination of the governance of the Corporation under the *Condominium Act*." This is a reference to the procedure contemplated by s. 41 of the **Condominium Act**. To simplify, when this procedure is properly invoked, the **Act** ceases to apply to the property and the owners become tenants in common in the same proportions as their common interests.

[14] Although a resolution to terminate was passed by votes representing over 80% of the units at a general meeting of owners in December of 1998, the termination did not become effective as the required documents were not accepted for registration by the Registrar of Condominiums.

[15] In late December of 1999, 2475813 Nova Scotia Limited, acting through its President, Mr. Brett, petitioned the Board of Directors to call a meeting of owners for the purpose of considering resolutions (referred to as a Resolutions A and B) authorizing the sale of the property to 2475813 Nova Scotia Limited, for $13,200,000 and the construction of an addition to the property. The Board convened the requested meeting on January 12, 2000

and the resolutions were declared passed on the affirmative vote of the units owned or controlled by the Brett interests. However, for reasons that will become apparent, no agreement of purchase and sale has been entered into in furtherance of these resolutions.

[16] For ease of reference, I will often refer to the various corporations owned or controlled by Mr. Brett as well as the units effectively under his control as the Brett interests and the appellants collectively as the individual unit holders.

III. Proceedings and Decision of the Chambers Judge:

[17] Various disputes between the Brett interests and the individual unit holders have resulted in litigation. The proceedings leading to these appeals are two applications, commenced within days of each other, to Supreme Court chambers for declaratory relief.

[18] The appellants (individual unit holders) are the plaintiffs in S.H. No 162174. Halifax Condominium Corporation No 151 (the corporation), 2475813 Nova Scotia Limited (the numbered company) and five individuals alleged to be

Directors of the Condominium Corporation (Bruce Brett, Charles Henman, Pamela Robertson, Betty Sinnis and Robert Thomson) are the named defendants. (As noted, the appellants have ownership interests in approximately 30 of the 200 units in Granbury Place.) They asked for various declarations that, in essence, the **Act** does not permit the proposed transactions and that there were procedural and other faults that invalidated the approval process. Specifically, they sought the following relief (the numbering is as used in the Notice of Application):

2. an order pursuant to section 38 of the *Condominium Act* and Rule 5.14 of the *Civil Procedure Rules* declaring that:

> Section 40 of the *Condominium Act* does not apply to authorize or permit a non-arms' length acquisition of the condominium property, including the units, by a unit owner owning a majority of interest in the common elements and particularly by a unit owner who is deemed to be the Declarant legally or beneficially owning an interest or 80% or more of the common elements;

and,

3. an order pursuant to section 38 of the *Condominium Act* and Rule 5.14 of the *Civil Procedure Rules* declaring that:

> 1. The purported authorization of the Board of Directors of the Defendant Halifax County Condominium Corporation No. 151 (the Defendant HCCC 151) *inter alia*, to sell all of the property of the

Defendant HCCC151 to the Defendant 2475813 Nova Scotia Limited by Resolution A, moved at a meeting of the unit owners of the Defendant HCCC 151 of 12 January 2000, is without the authority of the *Condominium Act* and is null and void upon the following grounds, namely:

1. Units are not included in the meaning of the term "property", within the meaning of section 40 of the *Condominium Act*;

2. Section 40 of the *Condominium Act* does not apply to the transaction purportedly authorized by Resolution A, such transaction being a non-arms' length acquisition of the property, including the units, by a unit owner owning a majority of interest in the common elements and particularly by a unit owner who is deemed to be the Declarant legally or beneficially owning an interest or 80% or more of the common elements;

3. At the time of the purported motion of Resolution A, there was no "sale" of the property, including the units, within the meaning of section 40 of the *Condominium Act*;

4. The purported Resolutions are a colourable attempt on the part of the Defendants, or some of the Defendants, to terminate the governance of the Defendant HCCC 151 by the *Condominium Act* without the consent of unit owners owning 100% of the common elements in accordance with the provisions of section 41 of the *Condominium Act*.

5. The process of the special meeting of the Defendant HCCC 151 purportedly held on 12 January 2000, was irregular and oppressive to the interest of the minority of unit owners;

> 6. The purported Resolutions were moved and voted upon without sufficient information presented to the meeting to enable members to make an informed decision on the issue;
>
> 7. The purported Resolutions were presented and voted upon without the presentation of proper, adequate or any analysis and recommendation by the management of the Defendant HCCC 151 so as to enable members to make an informed decision as to the best interests of the Defendant HCCC 151; and, ...
>
> and,
>
> 4. an order pursuant to section 38 of the *Condominium Act* and Rule 5.14 of the *Civil Procedure Rules* declaring that:
>
> The members of the Board of Directors of the Defendant HCCC 151 and, specifically, the Defendants Bruce Brett, Charles Henman, Pamela Robertson, Betty Sinnis and Robert Thomson, are in conflict with respect to the transactions purported authorized by Resolutions A and B, moved at a meeting of the unit owners of the Defendant HCCC 151 of 12 January 2000, and are prohibited from voting on, or being counted in quorum for, decisions and resolutions concerning the subject matter of such transactions by section 15F(7) of the *Condominium Act*.

[19] The Originating Notice also sought declaratory relief under the **Canadian Charter of Rights and Freedoms**, but on consent, this aspect of the application was severed and set to be heard separately from the other claims and is not before this Court in these appeals.

[20] In S.H. 162065, 2475813 Nova Scotia Limited is the plaintiff and the appellants are the defendants. The numbered company sought declaratory

relief under s. 40 of the **Condominium Act** which, in substance, would (a) affirm the validity of the resolutions authorizing the sale and addition; (b) affirm the requirement of all unit holders to execute a deed of conveyance and such other documentation usual to a purchase and sale of a condominium unit; and (c) affirm that individual unit holders should not direct a registered encumbrancer to unreasonably withhold consent to the sale.

[21] The applications were heard together by Oland, J. (as she then was) in chambers on April 3 and 4, 2000. In her decision given orally on April 20, 2000, she found, essentially, that the **Act** permits the sale to be authorized in these circumstances, that the encumbrancers can withhold their consent if they so choose and that the resolution should be found invalid because the directors did not provide the unit holders with adequate information before the vote. Specifically, the learned judge granted declarations as follows:

> 1. That s. 40 of the *Condominium Act*, and in particular s. 40(1), authorizes the sale of the property of Halifax County Condominium Corporation No. 151 by a vote of unit owners who own at least 80% of the common elements and consent of all registered encumbrancers;
>
> 2. That at any meeting of unit holders of Halifax County Condominium Corporation No. 151 called under the authority of the declaration and bylaws any

individual or corporation owning two or more units may exercise voting rights for each of the units owned;

3. That for the purpose of Section 40 of the *Condominium Act* property includes all units and the common elements in Halifax County Condominium Corporation No. 151;

4. That Sub-Section 40(2) and Sub-Section 40(3) of the *Condominium Act* require, upon the conditions of Sub-Section 40(1) having been met, any unit holder to execute a deed of conveyance and such other documentation usual to a purchase and sale of a condominium unit.

. . .

5. The purported authorization of the Board of Directors of the Defendant Halifax County Condominium Corporation No. 151 (the Defendant HCCC 151), *inter alia*, to sell all of the property of the Defendant HCCC 151 to the Defendant 2475813 Nova Scotia Limited by Resolution A, moved at a meeting of the unit owners of the Defendant HCCC 151 of 12 January 2000, is null and void upon the ground that purported Resolution was moved and voted upon without sufficient information presented to the meeting to enable members to make an informed decision on the issue.

IV. Issues on Appeal:

[22] The individual unit holders appeal the judge's disposition of both applications. The focus of their arguments is that the relevant provisions of the **Condominium Act** do not allow the numbered corporation to require them to sell their units to that corporation at a price of its choosing. The

defendants cross-appeal. They challenge the judge's decision that the resolution authorizing the sale was null and void, her refusal to set an effective date for the resolution and her refusal to grant a declaration that the individual unit owners shall not direct registered encumbrancers to unreasonably withhold consent to the sale.

[23] The issues raised on the appeal and the cross-appeal are inter-related and will be dealt with together. They may conveniently be grouped into issues relating to statutory interpretation, conflict of interest, adequacy of information, consent of the encumbrancers and fiduciary duty. I will address the issues in that way.

V. Analysis:

1. Statutory Interpretation:

[24] The chambers judge held that s. 40 of the **Condominium Act**: (a) permits a sale of the condominium property if authorized by a vote of unit holders who own at least 80% of the common elements and the consent of all registered encumbrancers**;** (b) that any individual or corporation owning two or more units may exercise voting rights for each of the units owned; (c) that "property" for the purposes of s. 40 of the **Act** includes all units and

common elements and (d) that once a sale is authorized pursuant to s. 40, unit holders are required to execute a deed of conveyance and such other documentation usual to the purchase and sale of a condominium unit.

[25] The appellants attack these conclusions making various arguments to the effect that the judge erred as a matter of statutory interpretation.

[26] It will be helpful to set out ss. 40 and 41 of the **Act** to which these arguments mainly relate:

> **40 (1)** Sale of the property or any part of the common elements may be authorized by
>
> (a) a vote of owners who own eighty per cent of the common elements; and
>
> (b) the consent of the persons having registered claims against the property or the part of the common elements, as the case may be, created after the acceptance for registration of the declaration and description.
>
> **(2)** A conveyance shall be executed by all the owners and a release or discharge shall be given by all the persons having registered claims against the property or the part of the common elements, as the case may be, created after the acceptance for registration of the declaration and description, and shall be submitted for registration together with a supplementary report on title in prescribed form showing the persons signing the same to be all the owners and persons having registered claims and the Registrar shall accept the deed or transfer so submitted for registration.

(3) Upon the acceptance for registration of the instruments mentioned in subsection (2),

(a) the government of the property or of the part of the common elements by this Act is terminated;

(b) claims against the land and interests appurtenant to the land created before the acceptance for registration of the declaration and description are as effective as if the declaration and description had not been accepted for registration; and

(c) claims against the property or the part of the common elements created after the acceptance for registration of the declaration and description are extinguished.

(4) Subject to subsection (5), the owners share the proceeds of the sale in the same proportions as their common interests.

(5) Where a sale is made pursuant to this Section, any owner who dissented may elect to have the fair market value of the property at the time of the sale determined by arbitration under the *Arbitration Act* by serving notice to that effect on the corporation within ten days after the vote, and the owner who served the notice is entitled to receive from the proceeds of the sale the amount the owner would have received if the sale price had been the fair market value as determined by the arbitration.

(6) Where the proceeds of the sale are inadequate to pay the amount determined pursuant to subsection (5), each of the owners who voted for the sale is liable for a portion of the deficiency determined by the proportions of their common interests. R.S., c. 85, s. 40; 1998, c. 28, s. 24.

> **41 (1)** Termination of the government of the property by this Act may be authorized
>
> (a) by a vote of owners who own one hundred per cent of the common elements;
>
> (b) by the consent of the persons having registered claims against the property, created after the acceptance for registration of the declaration and description.
>
> (emphasis added)

[27] The statutory interpretation arguments may be summarized as follows. The individual unit owners submit that the proposed acquisition by the numbered company was a colourable attempt by the Brett interests to terminate the governance of the Condominium Corporation without the consent of 100% of the unit owners in accordance with the provisions of s. 41 of the **Act**. It is further argued that the unit holders are not bound to execute a conveyance to which they do not consent, that Mr. Brett could not vote his interests based on his unit holding and that the proposed transaction is not a sale within the meaning of the **Act**.

[28] In my respectful view these arguments have no merit as a matter of statutory interpretation. With respect to what is required under section 40, the

chambers judge correctly interpreted the **Act** and I respectfully adopt her conclusions which she expressed in these terms:

> [20] It is my view that Section 40 of the Act authorizes sale of the property of the Corporation by a vote of unit owners who own at least eighty per cent of the common elements and the consent of all required encumbrancers. ... Section 40 itself contains all the requirements to authorize sale.
>
> [21] My interpretation that Section 40(1)(a) contemplates authorization by a vote of owners who own eighty per cent of the common elements is supported by Sections 40(5) and 40(6) which provide for arbitration to determine fair market value for "any owner who dissented". That phrase refers to an owner who voted against sale. Sections 40(5) and 40(6) underscore the possibility of less than one hundred per cent support for a sale. They also provide an essential mechanism for the protection of dissident unit owners. ...
>
> [22] Furthermore, the reference to a vote of the unit owners who own at least eighty per cent of the common elements in Section 40 is to be contrasted with that to one hundred per cent in Section 41 which deals with termination of governance of a condominium corporation. If the legislative intent was that one hundred per cent of such unit owners was necessary to authorize sale in Section 40, that provision could have been drafted to refer to that higher percentage.
>
> [23] The individual unit owners submitted that Section 40(2) requires any sale to be authorized by <u>all</u> unit owners. ... (underlining mine)
>
> [24] Those arguments are not persuasive. If accepted, they would mean that a sale could never be effected unless all of the owners of the common elements agreed. This is contrary to the plain language of Section 40(1)(a) and of Sections 40(5) and 40(6).

> [25] In addition, the suggestion by the individual unit owners that Section 40(1)(a) is merely a procedural provision designed to allow a Board of Directors of a condominium corporation to confirm a sale negotiated by the Board which is conditional upon that Board obtaining that eighty per cent approval is flawed. A purchaser whose offer was accepted based on an authorization vote of eighty per cent or greater would still have to face the possibility that at or before closing, one or more of the unit owners could refuse to sign the conveyance. This is not only a strained interpretation but simply unworkable as a matter of business efficacy.
>
> [26] The use of the active rather than the passive voice in Section 40(2) is not sufficient to overcome Section 40(1) and the arbitration provisions. ...
>
> [27] In summary, Section 40 of the Act authorizes sale of the property of a corporation by a vote of unit owners who own at least eighty percent of the common elements and the consent of all required encumbrancers. Once such vote has taken place, all unit owners are required to execute the conveyance of the property and any owner who voted against the sale is entitled to the protection of the arbitration procedures in Section 40(5) and 40(6) to determine fair market value of the property.

[29] It follows from this that once the requisite approval has been obtained, unit holders are obliged to execute a deed of conveyance and such other documentation usual to a purchase and sale of a condominium unit. I would, therefore, uphold the judge's declaration to that effect.

[30] With respect to voting rights, these are specified in the statute, by-laws and declaration of the corporation. I agree with the chambers judge's interpretation of these provisions as follows:

[28] It is my opinion that at any meeting of unit owners of the corporation called under the authority of the Declaration and By-Laws, any individual or corporation owing (sic) two or more units may exercise voting rights for each of the units owned. In particular, 2475813 Nova Scotia Limited was entitled to vote at the general meeting held on January 12, 2000.

[29] Voting rights attach to the ownership of units of the Corporation. "Owner" is defined in Section 3(1)(1) of the Act as follows:

> [q] "owner" means the owner or owners of the free hold estate or estates in a unit and common interests, . . ."

2475813 Nova Scotia Limited is an owner as defined in the Act. Article 1.08 of the Declaration of the Corporation reads as follows:

> 1.08 Voting Rights
>
> Voting rights accrue to each unit in the proportions outlined Schedule "C" expressed in percentages."

.....

[31] Nothing in the Act or in the Declaration of this Corporation prohibits any person from owning more than one unit or any number of units. There is nothing in the evidence regarding the acquisition of units by 2475813 Nova Scotia Limited which indicates that such acquisition was anything other than negotiated to the satisfaction of the parties involved.

[31] The appellants submit that the transaction proposed by the resolution is not a sale within the meaning of s. 40 of the **Act** and, therefore, is not a transaction which may be authorized under that section.

[32] On this aspect of the case, the chambers judge decided as follows:

> [36] The word "sale" in Section 40 does not mean only a sale at arms' length in the ordinary course of *bona fide* management of the Corporation. The individual unit owners urged that "sale" is limited to sales necessitated by heavy capital expenditures, for example, for remedial work required by environmental factors or for extensive repairs to the building's HVAC or other system, or to offers to purchase by a person at arm's length to the Corporation. That would require extensive "reading in" of additional wording to the legislation. There being a complete absence of any indication in the Act that "sale" was intended to bear such a restricted meaning, I am not prepared to do so.
>
> [37] The individual unit owners submitted that there was no "sale" authorized because Resolution A provided only the purchase price and the identity of the purchaser, and left the closing date and adjustments to be concluded by the Board. Section 40 provides for authorization for sale of the condominium property. The process contemplated commences with authorization for sale. The Section does not refer to approval of a particular, detailed offer to purchase. Resolution A clearly proposed such authorization and set out the two critical details of the price and the purchaser.
>
> [38] The Act deals with title to property held by multiple owners. In the case of Granbury Place where 2375813 Nova Scotia Limited and related corporations or persons own over eighty per cent of the units, there may be some forty or fifty owners. In other condominium corporations, there will be many more. I do not discourage the fullest presentation of a proposal but merely note that consideration of a heavily detailed proposal by multiple owners could be complicated. By making authorization of sale the initial step in the process, Section 40 ensures that the unit owners focus on that issue. Should any

> authorization be obtained, the less essential details of sale can then be negotiated. While it might have been desirable for some of the unit owners that particulars other than price and purchaser have been immediately available, for example that the closing date be not earlier than a date certain, such particulars are not essential to constitute a "sale" for the purposes of Section 40.

[33] The appellants submit that the term “sale”, which is not defined in the **Act**, should be given a meaning consistent with the purposes of the **Act** and the equities of the particular situation. They say that a sale has certain fundamental characteristics: a sale is a consensual arrangement pursuant to a contract which results in the transfer of property from one to another for valuable consideration. It is argued that the proposed transaction cannot be a sale because it is not consensual and does not result in a transfer of property from one to another.

[34] I cannot accept these submissions. As the respondents point out, the **Act** recognizes (and specifically permits) the authorization of sales to which not all of the unit holders may agree: see s. 40(5) and 40(6). It is apparent, therefore, that whatever else the term “sale” in s. 40 includes, it must include a transaction that is not consensual from the point of view of the dissenting unit holders. As for the argument that there is no transfer contemplated here, the facts show otherwise. All units will be transferred to the purchaser; it is not simply a transfer from the numbered company to itself.

[35] I conclude therefore that the proposed transaction is a sale within the meaning of s. 40 and would uphold the decision of the chambers judge in that regard.

2. Alleged Conflict of Interest:

[36] The appellants argue that the Directors contravened the provisions of s. 15F(7) of the **Act** by voting at a Directors' meeting when in a conflict of interest. The appellants submit that the members of the Board of Directors Charles Henman, Pamela Robertson, Betty Sinnis and Robert Thomson were in conflict of interest when the Directors voted in December of 1999 to convene a meeting of the members to consider the resolutions proposed by the numbered company. (Two additional facts should be noted. Ms Robertson was apparently not in attendance at the meeting and that the issue of her position was adjourned without hearing before the chambers judge because of Robertson's failure to appear for examination for discovery. Mr. Brett disclosed his interest in the proposed transaction on December 29, 1999, as contemplated by s. 15F of the **Act**.)

[37] Under Article V of the Condominium Corporation's By-Law No. 1, the Board has a non-discretionary duty to convene a general meeting upon receiving a petition in writing signed by owners entitled to vote with respect to twenty-five percent of the units. As noted earlier, the numbered company petitioned the Board for the meeting. The Board agreed to call the meeting and determined the material that would be sent to the owners with the notice of the meeting. As noted, the chamber's judge gave effect to the appellants' arguments concerning the inadequacy of this material. I will address here only the submission in relation to conflict of interest in relation to calling the meeting. I will address the issues concerning the adequacy of material provided to the owners later in my analysis.

[38] The chambers judge found there was no conflict within the meaning of the **Act** insofar as the decision to convene the meeting of members is concerned. She stated:

> [46] In December of 1999, the Board consisted of these four Directors and Mr. Brett. According to the evidence, Mr. Thomson is the General Manager of the condominium, and had been told by Mr. Brett that his position would continue. Mr. Henman had acted as a paid litigation agent for 2475813 Nova Scotia Limited and as a paid commission agent for sales he arranged by unit owners to that corporation. Ms. Sinnis had entered into an Agreement of Purchase and Sale of her unit with 2475813 Nova Scotia Limited or Mr. Brett, which Agreement has an "open" closing date.

> [47] None of these persons was in a conflict of interest as set out in Section 15F(7). The employment contracts of Mr. Henman and Mr. Thomson and the Agreement of Purchase and Sale by Ms. Sinnis are not contacts or proposed contracts to which the Corporation is or will be a party which were being voted upon at that meeting of the Board. Further, the fourth Director named as a Respondent, Ms. Robertson, was not present at the meeting.

[39] I respectfully agree with these conclusions and the reasons stated for them.

3. Adequacy of Information:

[40] Both the appellants and the respondents, by way of their cross appeal, challenge the judge's conclusions relating to the adequacy of the information placed before the meeting of unit holders. As noted, the chambers judge held that resolution authorizing the sale was null and void "... on the grounds that ...[it]... was moved and voted upon without sufficient information presented to the meeting to enable unit owners to make an informed decision on the issue."

[41] At their meeting of December 29, 1999, the Directors determined that the following information would accompany the Notice of Meeting to be called for January 12, 2000: an agenda, copies of the proposed resolutions and the notice of interest of Bruce R. Brett dated December 29, 1999, to which I have referred earlier. It follows that the owners were given notice of the identity of the intended purchaser and the total proposed purchase price. At the meeting, they were informed that the price was based on an appraisal.

[42] On this issue, the judge gave the following reasons:

[48] In support of their submission that insufficient information was provided to the unit owners, the individual unit owners argued that a condominium corporation was analogous to a corporation and referred to these excerpts from J.N. Wainberg, Company Meetings (3rd edition) at p. 14-15:

> 36. Business in Full
>
> All the motions (resolutions) ... intended to be presented to the meeting must be set out in the notice either in full or in sufficient detail to give the full effect thereof clearly and accurately. ...
>
> 37. Full disclosure
>
> In addition to setting out in full the motions (resolutions) intended to be presented to the meeting, the notice must (unless the motions are self-explanatory) give the background and other data necessary for the shareholder to be able to determine whether or not he should attend or whether or not he should appoint a proxy holder.

[49] However, those excepts deal with the sufficiency of the notice of meeting rather than of any information at the meeting itself. Here, the entire text of Resolution A accompanied the notice of meeting. That Resolution also included particulars of the arbitration procedure available to any dissenting unit owner. If the analogy to a corporation for this purpose is accepted, the requirements set out in Wainberg were entirely satisfied.

[50] I turn now to the meeting and the extent of the information available to the unit owners at the meeting. The individual unit owners suggested that the meeting was "oppressive". In response, 2475813 Nova Scotia Limited pointed out that nothing in the discovery examinations of Mr. Crosby, Mr. Halyk, Mr. Smith, or Ms. Lyttle suggested that they had found the meeting oppressive. Its counsel is correct in that that term did not appear in affidavit evidence or in the discovery excerpts.

[51] However, it is apparent from the transcript of the January 12, 2000 meeting attached as an exhibit to the Supplemental Affidavit of Ernest Crosby that scant information was available for the unit owners prior to the vote. Resolution A disclosed the purchase price and the identity of the purchaser. At the meeting, counsel for 2475813 Nova Scotia Limited referred to the "extension

of the offer of good faith negotiations" and "a suggestion that there may be an option" for residential leases for up to a year with appropriate rents charged according to pages 72 and 73 of the transcript. It was apparent from the responses of at least two unit owners described at pages 78 and 80 of that transcript that not all owners knew of such negotiations or relocation particulars. The Board had not arranged for any appraisal or any legal opinion respecting the legality, effect or potential liabilities of the sale. It made no recommendation respecting the proposed sale.

[52] The information pertaining to Resolution B was even less. Its Clause 2 resolved that the Board be authorized to enter into arrangements with 2475813 Nova Scotia Limited whereby that corporation would be granted permission to commence "construction of an addition to the present building", without more. For example, there were no details given as to the size or location of that addition, despite requests by the unit owners at the meeting. Again the Board had not arranged for any legal opinion with respect to the legality, effect of potential liabilities of that Resolution.

[53] The President of the Corporation chose not to attend the January 12, 2000 meeting. At discovery, she stated her concern that the meeting might be unpleasant. She was right to be concerned. The meeting was difficult, with many interruptions on points of order, objections, and requests for adjournment or for information.

[54] The individual unit owners submitted that there had been a failure of the Board in providing any response in the assessment of the proposed resolutions as to the best interests of all unit owners. 2475813 Nova Scotia Limited responded that it would have been wrong for the Board to make any recommendation. It suggested the situation had become polarized and urged that whether a unit owner decided to sell for the price offered was entirely up to him or her.

[55] What is troubling is not so much the lack of any recommendation, but rather the lack of information obtained by the Board for the unit owners. 2475813 Nova Scotia Limited took the position that not only must every unit owner assess the offer for himself or herself, but that he or she is individually responsible for obtaining any necessary information to do so. In short, it said the Board has no obligation in this regard.

[56] A unit owner knows the assessed value of his or her unit. Using the percentage of his or her common elements, an owner could calculate his or her share of any offer for the property of the Corporation. However, in general, an owner would not know the value of the property of the Corporation or be able to obtain such information easily or quickly.

[57] Let us assume that a party at arm's length to a condominium corporation makes an unsolicited offer to purchase the property of that corporation. The decision is one to be made by the unit owners. However, by Section 15 of the Act, a Board is to manage the affairs of the Corporation, and by Section 15D, Directors are to meet a statutory standard of care, diligence and skill. The submission of 2475813 Nova Scotia Limited would allow a Board to convene a meeting of unit owners to authorize such a hypothetical sale under Section 40 without arranging for some type of appraisal or for other pertinent information which may be triggered by the terms of the particular offer, for review by the owners at that meeting.

[58] Would or should a Board, as this Board did here, do nothing at all in response to such an unsolicited offer? In my view that would be unlikely and it would not be proper. Why then would any obligation on the Board to have appropriate information available when a proposed purchaser is at arm's length be different or less when the proposed purchaser is a current unit owner or one who owns a substantial number of units? I can see no reason.

[59] The Board arranged a meeting of the unit owners after Mr. Brett petitioned for one. By Article V(5) of By-Law Number 1, it had to convene a meeting of the unit owners within fifteen days after receipt of a petition by an owner of 25% of the units. It held its own meeting the day after it received the petition and set the meeting of the unit owners for the earliest possible date. Indeed, the Board subsequently discovered the notice was insufficient by one day and the meeting had to be rescheduled for a later date. Nothing in the Minutes of its meeting shows any consideration given to the obtaining of any information or advice. Without this, the unit owners were voting blind on Resolution A at the January 12, 2000 meeting. The same could be said of Resolution B.

> [60] I have not forgotten the safeguard of the arbitration provisions in the Act. It could be argued that their availability eliminates any need for the Board to arrange information. A unit owner who dissents could always receive fair market value under those provisions. That, I suggest, is an extreme view. Section 40(5) and 40(6) are only available when the stipulated percentage of unit owners authorize sale. My concern is not merely the price but rather the ability of unit owners to make reasoned decisions and the role of the Board in that regard.
>
> [61] Having in mind the particular history of this condominium corporation, I acknowledge that it may have been unrealistic to expect or require a recommendation from the Board, and particularly any as to the best interests of the Corporation, when there were strongly divergent views in that regard. However, this did not preclude the Board from obtaining information so Resolution A could be properly considered.
>
> [62] Appropriate and sufficient information to enable the unit owners to make informed decisions not having been provided at the January 12, 2000 meeting, the purported vote on Resolution A was a nullity.

[43] The appellants, while supporting this decision as far as it goes, say the judge did not go far enough. The appellants submit that the Directors failed to met their obligations to the unit holders. It is submitted that these breaches of duty include the failure to obtain "...an independent legal opinion as to the validity and effect and potential liabilities to the condominium of the actions of ... Brett", failure to present an "... analysis and a recommendation", failure to insure that an impartial person chaired the meeting, and permitting improper use of a proxy.

[44] The respondents, on their cross-appeal, attack the judge's conclusions, arguing that, in all of the circumstances, adequate information was provided.

[45] I am in respectful agreement with the conclusions and the reasons for them as stated by the chambers judge on this issue.

[46] In light of this conclusion, it is unnecessary for me to address the question of the effective date of the resolution.

4. Consent of Encumbrancers:

[47] On the cross-appeal, the respondents submit that "... the learned chambers judge erred in her interpretation that the owners were entitled to instruct registered encumbrancers to unreasonably withhold consent to the sale."

[48] The chambers judge refused to grant the declaration sought by the respondent to the effect that individual unit owners shall not direct a registered encumbrancer to unreasonably withhold consent to the sale of the property. She stated first, that the statute does not contain a stipulation that the encumbrancers cannot withhold their consent unreasonably; and, second, that in deciding whether to consent or not, an encumbrancer can consider "whatsoever it chooses, including any views of the unit owner."

[49] I agree with the second of these reasons. Provided the conduct is otherwise lawful, an owner is entitled to express his or her opinion about a proposed sale to an encumbrancer and the encumbrancer is entitled to consider whatever information it chooses. I also agree with the decision of the judge not to grant the declaration sought. Encumbrancers were not before the court and the declaration sought was premised on a hypothetical situation. Whether a duty not to withhold consent unreasonably should be read into the statute or otherwise be found to exist and to whom such a duty is owed are questions

which, in my opinion, are better resolved in a concrete factual setting and in the presence of all affected parties. I would, for those reasons, uphold the decision of the judge to refuse this part of the declaratory relief sought by the respondents.

5. Fiduciary Duty:

[50] The appellants sought a declaration that:

> Section 40 of the Condominium Act does not apply to authorize or permit a non-arms' length acquisition of the condominium property, including the units, by a unit owner owning a majority of interest in the common elements and particularly by a unit owner who is deemed to be the declarant legally or beneficially owning an interest [of] 80% or more of the common elements.

[51] In support of this position, they allege that the power conferred upon the Brett interests as holder of 80% control is subject to fiduciary duties owed to all the unit holders. The chambers judge held that there was nothing in the **Act**, the Declaration or the circumstances which prohibit any person from owning more than one unit or exercising the voting rights attached to the ownership of more than one unit.

[52] As I have said, I agree with the judge's interpretation of the statute and the Declaration and with her rejection of the appellants' arguments based on statutory interpretation. However, to my mind, that is not the end of the matter. It does not follow automatically, in my view, that this transaction is one that may be authorized under s. 40 if there is some legal constraint on the exercise by the majority interest of its authority to approve the

transaction. The key question is whether, in the circumstances of this case, the majority power may lawfully be used to approve this transaction.

[53] For reasons which I develop, I have concluded that Mr. Brett owes fiduciary duties to act in the interests of the unit owners and the corporation. These duties arise from the particular circumstances and relationships present in this case in light of the power conferred by s. 40 of the **Act**. The fundamental duty of a fiduciary is loyalty to those to whom the duty is owed. It follows that Mr. Brett, having regard to his fiduciary position, cannot exercise his voting control in a situation such as this where his interest and duty conflict and where he stands to benefit personally from the exercise of the authority. However, a transaction which would otherwise be contrary to the fiduciary's duty may be undertaken if all unit holders give their informed consent or if the transaction receives court approval.

[54] I will now set out in detail my reasons for this conclusion.

(a) Overview of Fiduciary Principles:

[55] The parties have been helpful in referring us to some of the authorities, both in Canada and the United States, which deal with particular fiduciary duties that may arise in relation to condominiums. I have found it helpful, however, to place these authorities in the context of the general development of fiduciary principles.

[56] Fiduciary principles have roots in equity extending to the early eighteenth century: see, for example, **Hodgkinson v. Simms**, [1994] 3 S.C.R. 377 at 407. As LaForest, J. put it

in **Hodgkinson**, the fiduciary duty is one of a "... species of a more generalized duty by which the law seeks to protect vulnerable people in transactions with others.": at 405. While many judicial decisions, including a series of cases in the Supreme Court of Canada, have given the law of fiduciary duties a well-defined analytical structure, one of their key elements is flexibility. Consistent with their equitable origins, fiduciary principles may be moulded to meet the needs of justice in a wide variety of circumstances. As LaForest, J. said in **Canson Enterprises v. Boughton**, [1991] 3 S.C.R. 534 at 585 - 6, "... the maxims of equity can be flexibly adapted to serve the ends of justice as perceived in our days. They are not rules that must be rigorously applied but malleable principles intended to serve the ends of fairness and justice." Or, as Laskin, J. said in **Canadian Aero Services v. O'Malley**, [1974] S.C.R. 592 at 609 "... new fact situations may require a reformulation of existing principle to maintain its vigour in the new setting."

[57] In keeping with this thinking, the Supreme Court of Canada has emphasized that the categories of fiduciary should not be considered closed: see **Guerin v. The Queen**, [1984] 3 S.C.R. 335 at 384 and **Hodgkinson, supra**, at 408. Fiduciary obligations do not only arise in certain categories of relationships, such as principal and agent. A fiduciary duty may arise from the nature of a relationship in specific circumstances even though, in general, a fiduciary duty would not otherwise exist. The question in such cases is whether fiduciary obligations "... arise as a matter of fact out of the specific circumstances of that particular relationship.": **Hodgkinson**, at 408.

[58] In considering whether a fiduciary relationship exists, the fundamental purposes of this equitable concept must be kept in mind. These purposes, which have been expressed in both scholarly and judicial writing, are to protect and foster the integrity of important social relationships and institutions where one party is given power to affect the important interests of another. The fiduciary principle helps to prevent, and may provide redress for abuse of such power, thereby ensuring that interdependence does not lead to subjugation. This point was made by Leonard I. Rotman, "*Fiduciary Obligations*", in Mark Gillen and Faye Woodman (eds), *The Law of Trusts A Contextual Approach* (2000), 739 -806 at 742:

> Fiduciary law has its origins not only in equity but also in public policy. The creation of fiduciary doctrine may be traced to the need to protect the continued existence of certain types of relationships within a given society. ...
>
> Fiduciary law exists to preserve the integrity of socially valuable or necessary relationships that arise as a result of human interdependency. Maintaining the viability of an interdependent society requires that interdependency be closely monitored to avoid the potential for abuse existing within such relations.
>
> Protecting the integrity of socially valuable relationships requires that those who possess the ability to affect others' interests be prevented from abusing their powers for personal gain. ...
>
> (emphasis added)

[59] To similar effect, LaForest, J. said in **Hodgkinson, supra**, at 422:

> The desire to protect and reinforce the integrity of social institutions and enterprises is prevalent throughout fiduciary law. The reason for this desire is that the law has recognized the importance of instilling in our social institutions and enterprises some recognition that not all relationships are characterized by a dynamic of mutual autonomy, and that the marketplace cannot always set the rules. ...
>
> (emphasis added)

[60] An analytical framework for determining whether a fiduciary relationship exists was set out in the dissenting judgment of Wilson, J. in **Frame v. Smith**, [1987] 2 S.C.R. 99 and subsequent cases have recognized it as helpful in identifying new categories of fiduciary relationships: see **Hodgkinson** at 408. Factors such as a person's scope for the exercise of some discretion or power, the right to exercise that power unilaterally to affect another's legal or practical interests and peculiar vulnerability to the exercise of that discretion are *indicia* of a fiduciary relationship: see **Hodgkinson** at 408. For present purposes, I find particularly helpful the statement of the characteristics of a fiduciary relationship as set out by McLachlin, J. (as she then was), in her reasons in **Canson** at 544, where, citing Cooter and Freedman, "The Fiduciary Relationship: Its Economic Character and Legal Consequence" (1991), 66 N.Y.U.L. Rev. 1045 she identified three characteristics, each of which is potentially relevant here. First, fiduciary relationships are often characterized by a separation between ownership and control. Here, the individual unit holders own their units, but in relation to a sale of the condominium development, control is conferred by the **Act** on those with 80 per cent of the votes. Second, fiduciary relationships are often characterized by the fiduciary having open-ended obligations in that specific conduct and definite results are not stipulated. Here, the authority granted by the **Act** to those controlling 80 per cent of the votes is conferred

in broad terms with no direction or guidance concerning the purposes of or the circumstances justifying its use. Third, a fiduciary relationship is often characterized by what Cooter refers to as "asymmetry of information concerning acts and results". By this I take it he means that the fiduciary is better informed than those to whom the duty is owed about the actions to be taken and their results. On the facts of this case, the chambers judge found that the directors failed to provide adequate information concerning the proposed transaction to the unit holders at large and there can be no doubt that Mr. Brett was in a much better position to evaluate the proposed sale than the individual unit holders.

[61] Where, as here, it is alleged that the fiduciary obligation arises out of the specific circumstances of a particular relationship, the key consideration is whether, in all of the circumstances, one party could reasonably have expected that the other would act in the former's best interest with respect to the subject matter at issue: **Hodgkinson** at 409. This does not preclude the fiduciary from acting in the joint interests of him or herself and those to whom the duty is owed. LaForest, J in **Hodgkinson** at 407 specifically approved the statement of Professor P. D. Finn in "Contract and the Fiduciary Principle" (1989), 12 U.N.S.W.L.J. 76 at 88 that the key consideration is whether "... the one has the right to expect that the other will act in the former's interests (<u>or, in some instances, in their joint interest</u>) to the exclusion of his own several interests." (emphasis added)

[62] I emphasize that, in this case, the alleged fiduciary duty is one that arises, if at all, from the <u>specific</u> circumstances of a particular relationship. We are not here concerned with an attempt to establish a new category of fiduciary relationships or even to establish some

generalized fiduciary duty in relation to the exercise of the power conferred by s. 40 of the **Act** to authorize sales of the property. The analysis here concerns the specific circumstances and relationships in this particular transaction and nothing more.

(b) Fiduciary Duties and the Condominium

[63] I noted earlier that the fundamental purpose of the law relating to fiduciaries is to reinforce the integrity of social institutions and enterprises. It follows from this that fiduciary principles must be applied in the context of condominium law in a manner which will further strengthen the integrity of the socially valuable relationships upon which the condominium is based. In doing so, there are two potentially conflicting considerations. The first is that condominiums under the **Act** are created by a reasonably comprehensive statutory code and the courts should, therefore, be cautious about imposing rights and duties which are not expressly included: see, for example, **Eberts v. Carleton Condominium Corporation No. 396**, [2000] O.J. No. 3773 (C.A.) (Q.L.); **National Trust v. Grey Condominium Corporation No. 36**, [1995] O.J. No. 2079 (Gen. Div.) (Q.L.); **Ceolaro v. York Humber Ltd.** (1994), 37 R.P.R. (2d) 1 (Gen. Div.). The other is that a residential condominium will often be the owner's home. Decisions of the corporation intimately affect their everyday lives as well as their financial security: see **Carleton Condominium Corp. No. 347 v. Trendsetter Developments Ltd. et al** (1992), 94 D.L.R. (4th) 577 (Ont. C.A.) at 586.

[64] The stated legislative purpose of the **Act** reflects the need "to facilitate the division of land into parts that are to be owned individually, and parts that are to be owned in common", " to provide for the use and management of such properties" as well the need "to expedite the dealings therewith." see section 2. It is, therefore, important in determining whether fiduciary obligations arise in particular circumstances to reflect the necessary balance between business efficacy required for effective management of the collective interests and security of individual ownership. It also must be remembered that, while condominium ownership has many of the attributes of individual ownership of real property, it is not identical with it. The joint ownership of common areas and the joint management of the property, which are central features of the condominium, necessarily limit or modify rights normally associated with the ownership of real property: see Oosterhoff and Rayner, *Anger and Honsberger Law of Real Property* (1985), vol. II, at s. 3902.

[65] Effective joint ownership and management require that differences of opinion about what is in the best interests of the condominium be resolved and decisions taken in a timely fashion. The sale provisions in the **Act** and the provisions for termination of the government of the property in s.41 are parts of the statutory scheme which reflect this requirement. They establish mechanisms for taking actions which fundamentally alter the condominium relationship. The ownership interests of unit holders are provided with considerable protection while recognizing that such extreme measures as a sale or termination of the condominium are, in fact, appropriate and necessary in some circumstances.

[66] With respect to a sale of the property, the legislation requires a strong majority of unit holders (i.e., 80%) to approve, which, in most circumstances, will reflect a widely held view among the unit holders that the proposed sale is in their interest and the interest of the corporation. Aside from assuring that proper information is presented to them, as the chambers judge required in this case, there is no need, in most cases, for any other protection for unit owners. Their own, well- informed decision, by a strong majority, to authorize the sale vouches for the fact that it is in their interest and in the interest of the corporation. The fact that unanimity is not required guards against unreasonable obstruction and promotes business efficacy that might be thwarted by a requirement for unanimity, but the requirement for 80% approval vouches for the fact that the transaction is, reasonably viewed, in the unit holders' collective interest.

[67] What, if any, aspects of the specific circumstances and relationship here would suggest that (to paraphrase LaForest, J. in **Hodgkinson** at 409) Mr. Brett would reasonably be expected by all unit holders to act in their collective best interests?

[68] First, I think it is relevant that Mr. Brett is not just a person who owns or controls the votes of 80% of the units. There is no dispute that Mr. Brett owned and controlled Brett Pontiac Buick GMC Limited. It was the declarant-owner of the property which became the condominium. There is also no dispute that he is the sole shareholder and an officer and director of the numbered company. At the relevant time, it owned 150 units and persons related to Mr. Brett owned 13 units. The numbered company was also the intended purchaser of the property.

[69] The respondents have not submitted that it is necessary for the purposes of this aspect of the case to pay attention to the various separate corporate entities. It is apparently acknowledged that Mr. Brett is the directing mind of all of them. This is clear as regards the numbered company from his letter to the unit owners dated December 3, 1998 in which Mr. Brett refers to the "... the interests which [he] owned or controlled" and to the fact that he "... commenced an extensive process of repurchasing units through 2475813 Nova Scotia Limited."

[70] Mr. Brett was also a director of the condominium corporation. While corporate law principles cannot simply be imported into condominium law without careful analysis, I note the strong line of authority that directors of corporations, including the directors of condominium corporations, owe fiduciary duties to the corporation to act in its best interests. As the Court put it in **Trendsetter**, **supra** at p. 590, directors "... owe a fiduciary duty to the corporation and not to any other individual or organization. If they fail in the exercise of that duty, they are subject to the full force of the law." To the same effect, in the context of business corporations, Laskin, J. said in relation to the fiduciary duties of directors in **O'Malley** at p. 610:

> What these decisions indicate is an updating of the equitable principle whose roots lie in the general standards that I have already mentioned, namely, loyalty, good faith and avoidance of a conflict of duty and self-interest. Strict application against directors and senior management officials is simply recognition of the degree of control which their positions give them in corporate operations, a control which rises above day-to-day accountability to owning shareholders...It is a necessary supplement, in the public interest, of statutory regulation and accountability which themselves are, at one and the same time, an acknowledgement of the importance of the corporation in the life of the

> community and of the need to compel obedience by it and by is promoters, directors and managers to norms of exemplary behaviour.
>
> (emphasis added)

[71] There is considerable authority for the view that the developer of a condominium owes certain fiduciary duties to those who purchase units in the property. While the existence and extent of these duties will depend on several considerations including the relevant legislation and the terms of the declaration and by-laws of the condominium, it has been widely accepted that the developer has certain fiduciary obligations to protect the interests of all unit owners, present and prospective, as well as the interests of the condominium corporation: see for example A. H. Oosterhoff and W.B. Rayner, Anger and Honsberger Law of Real Property (1985) vol II, s. 4008.1; **Condominium Plan No. 86-S-36901 v. Remai Construction (1981) Inc. et al.**(1991), 84 D.L.R. (4th) 6 (Sask C.A.) at 14 -19 and 22; **York Condominium Corp No 167 et al v. Newrey Holdings Ltd. et al.** (1981), 32 O.R. (2d) 458; 122 D.L.R. (3d) 280 (C.A.). It bears noting, however, that this duty does not require the fiduciary to act in the interests of a few dissident unit holders but in the interests of all of the unit holders: see e.g. **Re Carleton Condominium Corp. No 347 and Trendsetter Developments Ltd. et al.**, **supra** at 585 - 6.

[72] In summary, Mr. Brett's involvement in the development and marketing of the condominium and his position as one of the directors of the condominium corporation tend, in my view, to support a reasonable expectation on the part of the corporation and all the unit holders that he would act in their collective best interest.

[73] The controlling position of the Brett interests is a highly relevant consideration: see **Trendsetter** at p. 586. Section 40 of the **Act** provides that, subject to the approval of the encumbrancers, votes representing 80% of the units may authorize a sale of the property. This power, conferred by the statute, places other unit owners in a position of special vulnerability as the facts of this case amply demonstrate. The Brett interests have the power under the **Act** to dispossess dissenting unit holders by forcing them to sell their homes. In my view, unit holders would reasonably expect that this power would not be exercised by a director of the condominium corporation or the controlling mind of the developer other than in their collective best interest.

[74] Brooke, J.A., in **Frontenac Condominium Corp No.1 v. Joe Macciocchi & Sons Ltd**. (1975), 67 D.L.R. (3d) 199 (Ont.C.A.) spoke of what the "average person" understands about condominiums. I think his words are helpful on the issue of the reasonable expectations of unit holders in these circumstances. He said at (p. 202) that the average person would understand that "... no one, including the developer, would be in a position to put his economic interests against the interest of the group so far as joint ownership, management or enjoyment of the property was concerned, save through a mortgage or similar interest."

[75] Section 40 of the **Condominium Act** gives a broad authority to 80% of the unit holders to approve a sale of the property. The existence of such a power granted by statute does not in any way preclude the existence of a fiduciary duty on the part of one individual exercising it. It may, in fact, be a key consideration in finding that such a duty exists. This is well illustrated by **Guerin, supra**, where the Supreme Court of Canada found that

the Crown had fiduciary duties to Indians in its exercise of certain powers under the **Indian Act**. In rejecting the Crown's argument that the express statutory conferral on the Crown of a broad, discretionary power ousted the jurisdiction of the courts to intervene, Dickson, J., for the majority, said at 384:

> This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. Professor Ernest Weinrib maintains in his article *The Fiduciary Obligation* (1975), 25 U.T.L.J. 1, at p. 7, that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." Earlier, at p. 4, he puts the point in the following way:
>
> > [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.
>
> I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.
>
> (emphasis added)

[76] As noted, the **Act**'s requirement that a sale be authorized by 80% of the unit owners will, in most circumstances, provide adequate assurance that the sale is in the collective best interests of the unit owners and the condominium corporation. The situation is

completely different in the circumstances of this case, however. Where, as here, Mr. Brett controls 80% of the votes and the sale is to himself, it is apparent that the authorization of the sale by that majority does not carry with it any assurance that the sale is in the best interests of the unit holders or of the corporation. If unconstrained by equitable principle, the sale provisions in the **Act** would permit the unit owner with the controlling interest to impose a sale in his or her own interest and dispossess the others. Expressed in the language of fiduciary obligations, the controlling unit holder, in effect, is (i) approving a sale to himself; (ii) has control over the property interests of others which is conferred by the **Act** in open-ended terms; and (iii) is much better informed than the individual unit holders about the wisdom and benefits of the proposed sale.

[77] In my view, there are several strong indicators of a fiduciary obligation on the part of Mr. Brett in the particular circumstances and relationships present in this case. Would the existence of such an obligation serve to enhance the integrity of the condominium and further the purposes of the **Condominium Act**?

[78] The **Act**, it is true, provides a measure of protection to the dissenting unit holders by providing, in subsections 40(5) and 40(6) that they may have the market value of the property determined by arbitration and recover any deficiency from the owners who voted for the sale. I do not think, however, that these statutory provisions oust all other protections for unit holders that arise from general legal principles. I agree with the chambers judge that such would be "... an extreme view." Moreover, these rights are premised on the assumption that the sale was indeed in the best interests of the unit holders as a group as assured by at least 80% approval of it. They do not provide an

answer to the problem that, where a controlling owner is selling to himself, there is no such assurance.

[79] In my view, the imposition of a fiduciary relationship in these circumstances will further, rather than hinder, the implementation of the purposes of the **Act** to the extent that the existence of this duty requires some further assurance beyond the 80% approval that the proposed sale is, in fact, in the best interests of both the unit holders and the corporation.

[80] I return to what was identified by LaForest, J. in **Hodgkinson** as the key question. In all the surrounding circumstances, would the unit owners reasonably have expected that Mr. Brett would exercise his voting control with respect to a sale of the property in the best interests of all unit owners? In my view they would. Mr. Brett was the controlling mind of the developer who sold units in this condominium. He was a director of the condominium corporation. His voting control gave him a broad, discretionary power to affect not just the property rights of the other owners, but to dispossess them of their homes. That power made the other unit holders vulnerable to its exercise in matters affecting their vital interests. He was the directing mind and owner of the purchaser in the transaction for which his voting control assured approval. In these circumstances, justice and the proper administration of a condominium require that Mr. Brett be subject to a fiduciary obligation which disentitles him from authorizing this sale without other objective assurances that it is in the best interests of the corporation and the unit holders as a whole.

[81] I conclude, therefore, that Mr. Brett was subject to two fiduciary duties. First, by virtue of being the owner and controlling mind of the developer and having effective voting

control of the corporation, he owed a fiduciary duty to all of the unit holders not to use that voting control to authorize a sale of the property where, as here, their interests and his could conflict. Second, by virtue of Mr. Brett's position as a director of the corporation, he owed a fiduciary duty to the corporation of a similar character.

[82] Having identified a fiduciary relationship, it is necessary to be specific about its nature and extent and its implications for a vote of unit owners authorizing a sale of the property pursuant to s. 40 of the **Act**. The term fiduciary refers to many different types of relationships and may give rise to a range of different duties. As was pointed out by Fletcher-Moulton, L.J. in **In re Coomber**, [1911] 1 Ch. 723 at 728 - 29:

> ... Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another ... All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. ... [I]n some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted... Of course that is absurd. The nature of the fiduciary relationship must be such that it justifies the interference.
>
> (emphasis added)

[83] It is, therefore, necessary to define with precision the nature and extent of the duties attached to the particular fiduciary relationship. In this case, the only issue is whether the fiduciary relationship gave rise to any restriction on the right of Mr. Brett to proceed with the sale to himself which was authorized by voting his 80% interest as a unit holder.

[84] I mention this to emphasize that, in this case, it is not necessary to determine the precise extent of the fiduciary duties, if any, that may arise in relation to other aspects of the condominium corporation's decision-making. We are dealing here only with the question of a resolution to sell the property in a situation in which the intended purchaser also has sufficient voting control to achieve the required authorization under the **Act** and where the person effectively exercising voting control is also the controlling mind of the developer and a director of the condominium corporation.

[85] We are not here concerned with an alleged breach of the duty to act in the best interests of the corporation or the unit holders. The fact that such a duty exists does not lead to the conclusion that the proposed transaction is not in the best interests of all of the unit holders or of the corporation itself. That issue is not before the Court in these proceedings. The duty to act in the best interests of the unit holders does not mean that only actions to which they all assent may be considered in their best interests. The duty to act in the best interests of the corporation does not mean that only actions to which all unit holders agree may be taken. Moreover, there is nothing before the Court which would justify a conclusion that the proposed transaction is or is not in the best interests of the unit holders collectively or of the corporation.

[86] The existence of the fiduciary duties does, however, limit the ability of the fiduciary to impose the sale on dissenting unit holders where the transaction is such that the fiduciary's duty and interest conflict and where the fiduciary stands to benefit from the transaction. This conflict and potential for personal gain on the part of Mr. Brett coupled with his voting control take away the assurance normally provided by the favourable vote

of a strong majority that the decision is, in fact, in the best interests of the unit holders and of the corporation.

[87] The fiduciary, in these circumstances, does not stand in the same position as a true trustee. The obligation is not to act selflessly, but to act in the best interests of all the unit holders and of the corporation. The duty does not preclude personal profit from the decision, but rather it precludes profit at the expense of others. Mr. Brett, through his company, has a large investment in the condominium. His right to act as he sees fit to protect that investment must not be unduly restricted. He must not be disenfranchised and the condominium corporation must not be left in an irreconcilable deadlock. What the fiduciary principle requires in the context of s. 40 of the **Act** and the circumstances of this case is some substitute mechanism for assuring that the proposed sale is in the interests of the unit holders and the corporation, an assurance normally provided by the vote of a strong majority of the unit holders.

[88] In my view, that assurance may be provided here in each of two ways. First, the informed consent of all of the unit owners other than the Brett interests, in addition to the support of the Brett interests, would provide the assurance sought by the statute that the transaction is in the best interests of the unit holders as a group. Failing that, such assurance could be provided by approval of the transaction by an application to the Supreme Court of Nova Scotia on notice to all unit holders, the corporation and registered encumbrancers. The role of the Court on such an application would be to determine whether the proponents of the transaction have shown that, having regard to the circumstances of, and future prospects for, the condominium, there are sound reasons

supporting the view that the proposed transaction is in the interests of unit holders and the corporation collectively. Having regard to the fact that the sale will result in the termination of government of the property (s. 40(3)), a Court hearing such an application for approval may find it helpful to consider some or all of the matters relevant to Court ordered termination as set out in the authorities and s. 43(2) of the **Act**.

[89] For the reasons I have given, I would set aside paragraph 1 of the declaration made by the Chambers judge in file S.H. No. 162065 and in its place make the following declaration:

> 1. That, in the circumstances of the fiduciary duties owed by Mr. Brett to the unit holders and the to the corporation, a sale of the property of Halifax County Condominium Corporation No. 151 to a corporation under his control may be authorized pursuant to section 40 of the Condominium Act by unanimous approval of the other unit holders or by order of the Supreme Court of Nova Scotia.

[90] The order in S.H. No. 162174 should be amended accordingly. To that extent, I would allow the appeals. As noted earlier, I would dismiss the cross-appeals. As success on the appeals is divided, I would make no order as to costs with respect to them. I would order that the respondents pay to the appellants the costs of the cross-appeals which I would fix at $1500 plus disbursements relating to the cross-appeals.

Cromwell, J.A.

Concurred in:

Hallett, J.A.

Bateman, J.A.