

NOVA SCOTIA COURT OF APPEAL
[Cite as: *2475813 Nova Scotia Ltd. v. Ali*, 2002 NSCA 59]

Cromwell, Hallett and Hamilton, J.J.A.

BETWEEN:

2475813 NOVA SCOTIA LIMITED, a body corporate

Appellant

- and -

Intab **ALI**, Tilda **ANDERSON**, Wayne **ANDERSON**, Wesley **ANDERSON**, Carol M. **BONIN**, Kenneth **BOUCHER**, Douglas **BRUCE**, Louise **BRUCE**, Elizabeth **CARRUTHERS**, Amelia Kwai **CHAN**, Chester **COLLIER**, Peter **COLLIER**, Ernest L. **CROSBY**, Luella R. **CROSBY**, Stephanie **CROWE**, Barrie **GREEN**, Russell M. **HALYK**, Mary Patricia **HAMMOND**, Marlene D. **HENRY**, Linda G. **IVANY**, Francoise P. **LANG**, Beverly M. **LUNDRIGAN**, John **LYTTLE**, Carole A. **MacKAY**, Mary K. **MacISAAC**, Stephen (Fred) **MacNEIL**, Moris **MITO**, Phillip N. **MUNDY**. E. Manley **NEWKIRK**, Clinton E. **NICKLE**, Thelma **NICKLE**, Doris **OKIHIRO**, Velmurugan **PILLAY**, I. Lynn **POLLEY**, Lolita V. **POPAT**, Vrajlal T. **POPAT**, Glenda **REDDEN**, Robert Kenneth **RICHARDSON**, executor and trustee of the Estate of Graham Barry **RICHARDSON**, Rita M. **ROGERS**, Alice **SHEA**, George J. **SHEA**, Donathan S. **SMITH**, Evelyn R. **SMITH**, Doreen **SNOW**, Doris J. **STODDARD**, James M. **STODDARD**, Fulton M. **STODDARD**, Lester F. **ZINCK**, Rebecca M. **ZINCK**, **THE ATTORNEY GENERAL OF NOVA SCOTIA** representing Her Majesty the Queen in the Right of the Province of Nova Scotia, **BANK OF MONTREAL**, a body corporate, **BARRIE M. GREEN INCORPORATED**, a body corporate **AND BARRIE GREEN FAMILY TRUST**, **BRETT PONTIAC BUICK GMC LTD.**, a body corporate, **CIBC MORTGAGE CORP.**, a body corporate, **CIBC MORTGAGES INC.**, a body corporate, **CANADA TRUSTCO MORTGAGE COMPANY**, a body corporate, **EQUISURE TRUST COMPANY**, a body corporate, on behalf of **Evangeline Trust Co.**, a body corporate, Gladys **SNOW**, **HALIFAX COUNTY CONDOMINIUM CORPORATION No. 151**, a body corporate, **ROYAL BANK OF CANADA**, a body corporate, **ROYAL TRUST CORPORATION**, a body corporate, **SCOTIA MORTGAGE CORPORATION**, a body corporate

Respondents

REASONS FOR JUDGMENT

Counsel: Dennis James and Paul Morris for the appellant
Ross H. Haynes and David A. Copp for certain respondents
Edward A. Gores for the Attorney General of Nova Scotia not appearing

Appeal Heard: March 26, 2002

Judgment Delivered: April 30, 2002

THE COURT: Leave to appeal is granted but the appeal is dismissed per reasons for judgment of Cromwell, J.A.; Hallett and Hamilton, J.J.A. concurring.

CROMWELL, J.A.:

- [1] The appellant issued an originating notice (application inter partes) seeking an order authorizing the sale of Halifax County Condominium Corporation No. 151 or, in the alternative, an order pursuant to s. 43 of the *Condominium Act*, R.S.N.S. 1989, c. 85, as amended, terminating the government of the property. The respondents applied to Hood, J. in chambers and were granted an order that the matter proceed by way of action rather than by application. The appellant applies for leave to appeal and, if granted, asks us to set aside that order.
- [2] There has been a longstanding and difficult relationship between the respondents, who are dissenting unit holders in the condominium, and Mr. Brett, the principal of the appellant. Mr. Brett proposed to use his 80 per cent voting control of the condominium corporation to authorize a sale of the property to a corporation controlled by him. Earlier court proceedings involving these and other parties resulted in an order of this Court that any sale to a corporation controlled by Mr. Brett requires either unanimous approval of the unit holders or court authorization: *2475813 Nova Scotia Ltd. v. Rodgers*, 2001 NSCA 12; 189 N.S.R. (2d) 363.
- [3] In that decision, the Court imposed a limited fiduciary duty arising from the specific circumstances. Writing for the Court, I said at paras. 83, 84, 87 and 88:

[83] ... 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] ... 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.

[87] The fiduciary, in these circumstances, does not stand in the same position as a true trustee. ... 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] ... 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**.

[Emphasis Added]

- [4] In ordering that the appellant's application proceed as an action, the chambers judge said this:

[16] The applicants say that these respondents have not clearly set out the facts which are in dispute. In my view, in the circumstances of this case, that is not necessary. Although the procedures for sale of a condominium or termination of its existence as a condominium are relatively straightforward, the peculiar circumstances of this case make it anything but straightforward.

...

[19] ... In light of the existence of the fiduciary obligations of Bruce Brett and the requirement for the court to look at what is just and equitable, whether acting under s. 40 or s. 43, I am satisfied that affidavit evidence will not be adequate. In order for the judge to make a decision about what is just and equitable under ss. 40 or 43, *viva voce* testimony and cross-examination of witnesses will be required. It is clear to me that there are distinct and opposing views of what is just and equitable in the circumstances of this case and that full airing of those positions can only be conducted in a trial.

[Emphasis Added]

- [5] The appellant's position is that the chambers judge was wrong in principle in this portion of her decision. It is submitted that Hood, J. erred in making the order in absence of the respondents setting out a clear statement of the specific facts which are in dispute.
- [6] The material before the chambers judge does not clearly define the issues to be adjudicated in the application and indicates that there are extensive parallel and related proceedings commenced by way of action pending. The pleadings which are exhibited to the affidavits reveal wide-ranging allegations and cross-allegations, all of which appear

to be in dispute between the parties. Mr. Brett's affidavit filed in support of the application to approve a sale and to terminate government of the property addresses only vaguely and inferentially the factors which the Court is required to consider pursuant to s. 43(2) of the *Act*. On the other hand, the material filed on behalf of the respondents fails to identify with precision particular facts in dispute. The respondents appear to proceed on the unstated assumption that every grievance that they have with Mr. Brett since the marketing of the condominium is relevant on the application. The chambers judge also appears to have taken a very broad view of relevance in light of the court's obligation to determine what is just and equitable.

[7] We have not had the benefit of submissions on the scope of the issues which it will be the court's duty to consider on the application or the impact that scope would have on the definition of what facts would be relevant to the application. However, and without attempting to be definitive, it is clear that the equitable jurisdiction which the court is called upon to exercise on the application to approve a sale and terminate the government of the property must be understood within the context of the scheme and purpose of the *Condominium Act*. As we said in our earlier decision, the key issue on the application to approve the sale is to determine whether there are sound reasons supporting the view that the proposed transaction is in the interest of the unit holders and the corporation collectively. Under s. 43, the court is directed to determine what is just and equitable, but to do so in light of the scheme and intent of the Act: see s. 43(2)(a). It is neither within the scheme of the *Act* nor within the parameters of our earlier decision to mire this condominium in unfocused and protracted litigation. With more carefully defined issues and material responsive to them, we are far from persuaded that this matter could not have proceeded by way of application.

[8] However, in light of the material presented to the chambers judge and the apparent absence of either definition of the issues or material more closely focused on those issues, we see no error in principle in the judge's conclusion that the affidavit evidence will not be adequate and that the wide-ranging material placed before her revealed numerous factual disputes. There was no way in which the chambers judge could define the relevance or otherwise of many of these factual disputes. In short, the material before the judge presented apparently wide-ranging disputes over a number of matters and over a number of years and failed to provide her with any realistic way to assess the relevance or otherwise of these disputes to the application to approve the sale or terminate the government of the property. In those circumstances, she did not err in directing the matter proceed by way of action.

[9] I would grant leave to appeal but dismiss the appeal. Costs fixed at \$1500 plus disbursements will be costs in the cause of the main action.

Cromwell, J.A.

Concurred in:

Hallett, J.A.

Hamilton, J.A.