SUPREME COURT OF NOVA SCOTIA
Citation: *Duncan v. Savoy*, 2020 NSSC 331

Date: 20201118
Docket: Hfx No. 492154
Registry: Halifax

Between:

William Duncan and Sharon Duncan

Applicants

v.

Jeannette Savoy

Respondent

D E C I S I O N

Judge:	The Honourable Justice Christa M. Brothers
Heard:	September 21, 2020, in Halifax, Nova Scotia
Written Decision:	November 18, 2020
Counsel:	Barry J. Mason, Q.C., for the Applicants Michael Savoy, appearing for the Respondent

By the Court:

OVERVIEW:

[1] This matter arises from a real property dispute concerning a condominium on Bedros Lane in Halifax. The applicants and respondent entered into an Agreement of Purchase and Sale (the "Agreement") for the condominium. The Agreement required the respondent to provide an Estoppel Certificate (the "Certificate") no later than seven days before closing, which the respondent did. After the applicants received the Certificate, they withdrew from the Agreement. The respondent kept the deposit of $25,000.00, alleging that the applicants had breached the Agreement. The applicants seek the return of their deposit.

[2] The applicants filed an amended Notice of Application on October 11, 2019, seeking, *inter alia*, a declaration that the Agreement is of no force and effect and an order requiring the respondent to return the deposit. The central issue is the interpretation of the Agreement, specifically the purchasers' ability to terminate after delivery of the Certificate.

BACKGROUND:

[3] On November 9, 2018, the applicants agreed to purchase the condominium from the respondent, for $465,000.00, closing on or before June 17, 2019. Paragraph 2.3 of the ReSale Condominium Schedule deals with the Certificate, requiring the respondent to provide the applicant with a copy of the Certificate, no less than seven business days prior to the closing date, prepared and executed in accordance with the *Condominium Act*, R.S.N.S. 1989, c. 85, and the bylaws of the Condominium Corporation. On June 9, 2018, the respondent provided a copy of the Certificate to the applicants. On June 12, the applicants advised that they were concerned about the financial health of the condominium corporation and the need for additional expenditures, based on information in the Certificate. The applicants concluded there were several deficiencies in the unit specifically, and the building in general, including water leaks. Based on the Certificate, they were not satisfied that there were sufficient contingency reserve funds to cover the expenditures by the Condominium Corporation necessary to remedy the deficiencies.

[4] The applicants subsequently terminated the Agreement requesting the return of the $25,000.00 deposit. The respondent has refused to return the deposit. The

applicant maintains that this refusal constitutes a breach of the Agreement, in particular para. 2.3 of the Re-Sale Condominium Schedule.

PRELIMINARY MOTION:

[5] There was a preliminary motion by the applicants to strike portions of Michael Savoy's affidavit (the "Savoy affidavit"), filed by the respondent. Counsel for the applicants argues that paragraph 18 of the Savoy affidavit provides an inadmissible lay opinion concerning contractual interpretation. I agree that this paragraph contravenes the rules concerning admissible affidavit evidence as developed in the caselaw since *Waverley (Village) v. Nova Scotia (Minister of Municipal Affairs)*(1993), 123 N.S.R. (2d) 46 (S.C.), and in the *Civil Procedure Rules*. This paragraph contains irrelevant and impermissible opinion evidence concerning the interpretation of the Agreement, and is struck out.

AFFIDAVIT EVIDENCE AND THE AGREEMENT:

[6] The applicant William Duncan swore an affidavit (the "Duncan affidavit") on December 13, 2019. He was not cross-examined by the respondent. The Duncan affidavit sets forth the history of the applicants' search for a condominium.

[7] Appended to the affidavit is a copy of the executed Agreement. Clause 1.1 of the Agreement required the applicants to pay a deposit of $25,000 on or before November 26, 2018. The deposit was paid. The provisions of the Agreement regarding the deposit are as follows:

> 1.1 The Buyer submits Twenty-five thousand dollars ($25,000.00 CDN) on or before the 26 day of Nov, 2018, payable to REMAX NOVA in trust, as a deposit to be held pending completion or termination of this Agreement and to be credited towards the purchase price on completion. Balance of purchase price to be paid on closing or as otherwise stated in this Agreement. <u>If the deposit is not delivered as specified, the Seller shall be at liberty to declare this Agreement null and void</u>.
>
> 1.2 <u>It is understood and agreed that if the Buyer does not complete this Agreement in accordance with the terms thereof, the Buyer shall forfeit the deposit, in addition to any other claim which the Seller may have against the Buyer for the Buyer's failure to complete</u>. If the deposit is being returned to the Buyer in accordance with the terms of this Agreement, it shall be done without interest or penalty (unless otherwise specified). It is agreed by the Buyer and the Seller that the release of the deposit from the brokerage trust account is subject to the applicable NSREC Bylaws.

> 1.3 The Buyer and Seller agree that any deposit held in trust by the Brokerage per clause 1.1, that is over and above the remuneration (including HST) due to that Brokerage on closing of the transaction, shall be transferred to the Seller's lawyer's trust account once conditions unrelated to title have been met. These funds shall remain in the Seller's lawyer's trust account until closing.

[8] The ReSale Condominium Schedule is part of the Agreement. Clause 2 to the Schedule lists the documentation to be provided to the purchaser by the seller, and stipulates when those documents must be provided:

> 2.1 The Seller shall provide the Buyer with a copy of (hereinafter the Documents)
>
> a) the declaration, the bylaws, the common element rules and regulation of the Condominium Corporation;
>
> b) the reserve-fund study (if applicable);
>
> c) the most recent financial statements; and,
>
> d) the last 12 months of board of directors' and members' minutes including most recent AGM minutes,
>
> on or before the 26 day of November, 2018. The Buyer shall be deemed to be satisfied with the Documents unless the Seller or the Seller's Agent is notified to the contrary, in writing, on or before the 5 day of December, 2018. If notice to the contrary is received, then either party shall be at liberty to terminate this Agreement and the deposit shall be returned to the Buyer.
>
> 2.2 It is understood and agreed by the parties that the results of a reserve fund study may cause the condominium fees to increase or a Special Assessment to be levied.
>
> 2.3 The Seller agrees, at their expense, to provide the Buyer an estoppel certificate prepared and executed in accordance with the *Condominium Act* of Nova Scotia and the bylaws of the Condominium Corporation in respect to the common expenses of the Seller and any default in payment thereof, no less than seven (7) business days prior to the closing date. The Buyer shall be deemed satisfied with the certificate unless the Seller or the Seller's Agent is notified to the contrary, in writing, within three (3) business days of receipt of the certificate. If notice to the contrary is received, then either party shall be at liberty to terminate this Agreement and the deposit shall be returned to the Buyer.

[9] On February 4, 2019, the applicants were in Florida when their real estate agent, Bonnie Hutchins, contacted them and advised that there had been a water leak in the respondent's condominium, as a result of water infiltration at a door. She informed them that the repairs would be undertaken by the Condominium

Corporation and completed before they returned to Halifax. However, the promised remediation was not completed prior to their return.

[10] On June 10, 2019, the applicants received a copy of the Certificate from the respondent. The Certificate stated, in part:

> Estoppel Certificate
>
> I, Tony Hall, of Podium Properties Limited, 61 Prince Albert Road, Dartmouth, NS, B2Y 1M1 (902-445-4936), agent for Halifax County Condominium Corporation No. 267 (hereinafter referred to as the Corporation), hereby certify that I have inspected the accounts and records of the Corporation with respect to Level 5, Unit 507 **and are no outstanding charges owed to the Corporation as of June 10, 2019.**
>
> As at April 30, 2019 the **un-audited** books of the Corporation show a balance in the Reserve and Contingency funds in the amount of $209, 877.23 which amount is non refundable.
>
> Schedule "A", consisting of three pages attached hereto, is hereby incorporated by reference as a part of this certificate.
>
> Dated at Dartmouth, in the County of Halifax, Province of Nova Scotia, this 10th day of June, 2019.
> ....
>
> **RE: Level 5, Unit 507**
> **No. 53 Bedros Lane, Halifax**
>
> Schedule "A"
> % Common interest – Unit 507 = 1.74%
> % Common Expense – Unit 507 = 1.74%
> Balance: (Un-audited) Reserve Fund as at April 30, 2019 = $121,947.74
> Basis for accumulation of reserve fund:
>
> The 2019 budget made a provision to transfer a balance of $100,020 which is transferred on a monthly basis. This amount is recommended by the engineering study completed in October 2015 by BRK Engineering.
>
> This estoppel certificate is subject to any changes that may be required due to the provision of the Condominium Act.
>
> **Should the Purchaser wish to carry out any alteration to Unit 507 located at No. 53 Bedros Lane, Halifax, please have them execute the attached agreement and return to our office with attached specifications and/or plans per schedule A of the By-laws. Once received the Board of Directors will review for possible approval.**
> ....

RE: Level 5, Unit 507
No. 53 Bedros Lane, Halifax

Names and addresses of the officers of the Corporation are as follows (at H.C.C. #267):

Vice-President	Wayne Grennan	204, 53 Bedros Lane, Halifax, NS
Secretary	David Wright	510, 53 Bedros Lane, Halifax, NS
Treasurer	Harold Dunstan	407, 53 Bedros Lane, Halifax, NS
Director	Christine Angelopoulos	511, 53 Bedros Lane, Halifax NS

1. Specific assessments that are forthcoming or contemplated by the corporation within twelve months of the date of the estoppel certificate –

   Yes ___ No X

2. Major capital expenditures that are planned by the Corporation – Yes X No____. The Condominium Corporation is in the process of replacing 24 windows in 4 units and related building envelope repairs. The project is expected to cost $150,000. The work is being carried out by D&M Morash, supervised by Bluenose Engineering. This cost is expected to be covered by the reserve fund.

3. Lawsuits, which have been instituted, or are pending by the Corporation or against the Corporation
   Yes___ No X

4. Debt carried by the Corporation from previous expenditures
   Yes ___ No X

5. (a) The following documents are enclosed to be supplied to the purchaser: insurance policy, operation budget, last audited financial statements, reserve fund study, By-Laws, and Declaration. A PAD from is enclosed. A Resident Information form is attached and must be completed and returned to the Corporation's agent Podium Properties Ltd., prior to the new owner taking occupancy.

   (b) If the unit will not be occupied by the purchaser, then the enclosed undertaking must be executed by those occupying the unit. A copy of the completed undertaking must be forwarded to Podium Properties Ltd...

[11] The Certificate indicated that as of April 30, 2019, the unaudited books of the Condominium Corporation (hereinafter the Corporation) showed a combined balance in the reserve and contingency funds of $209,877.23 and that the Corporation was "in the process of replacing 24 windows in 4 units and related building envelope repairs" at an expected cost $150,000.00, which was "expected to be covered by the reserve fund."

[12] As a result of this information, the applicants became concerned about the financial health of the Corporation, due to the forecast of significant expenditures to

be incurred. The applicants were further concerned that the reserve and contingency funds were inadequate to cover the costs of the repairs and that, as a result of insufficient funds, the work would take longer to complete, and would require additional funds from the unit holders.

[13] On June 12, 2019, the applicants advised the respondent of their intention to terminate the Agreement, by means of a letter from their counsel, referring to clause 2.3 of the Schedule, and seeking return of the deposit. The respondent took the position that the Agreement had been improperly terminated and refused to return the deposit. As a result of this information, the applicants considered whether they could still proceed with the transaction. To that end, they spoke to the President of Podium Properties Limited on or about June 12, 2019, to discuss the repairs. As a result of some of the conditions he observed at the condominium complex, Mr. Duncan had concerns about future water leaks. He was informed that the required repairs would not be completed before the closing date.

[14] The respondent's spouse, Michael Savoy, provided an affidavit, sworn January 10, 2020. There was no cross-examination. Mr. Savoy deposed that various documents were provided to the applicants pursuant to clause 2.1 of the ReSale Condominium Schedule, including Declarations, By-Laws, reserve fund study, financial statements, annual minutes from the most recent meeting, as well as the last 12 months' minutes of the Board of Directors meetings. Mr. Savoy said no objection was raised by November 26, 2018. Mr. Savoy said he was aware, based on discussions with Bonnie Hutchins, that the applicants' home was listed for sale, but the Agreement did not make the purchase conditional upon the sale of the applicants' property. Mr. Savoy's and the respondent speculate that the applicants' failure to sell their home motivated them to renege on the Agreement. There is no evidence for this, except Mr. Savoy's speculation and innuendo.

[15] Mr. Savoy deposes that due to a severe storm in April 2019, with high winds and gusts reaching hurricane force, a small water leak occurred at the exterior balcony doors of the condominium. The Corporation decided to change the patio door, as all of the doors were being replaced over a period of years. The repair was completed in late April or early May 2019. The applicants objected to the replacement, as it was a different style of door. It would take three to four months to obtain a second door that matched the remaining patio door.

[16] As a result of what he believed were assurances from the real estate agent that all the conditions of the Agreement had been satisfied, Mr. Savoy decided to submit

an unconditional offer on a property in Dartmouth. That transaction was completed on June 3, 2019, two weeks before the closing of the Agreement.

[17] The respondent maintains that the Certificate provided on June 10, 2019, was "unblemished" and did not disclose any new or material facts that would be of concern to a purchaser. The respondent argues that the Certificate merely confirmed the financial information originally provided to the applicants in November 2018. The respondent maintains that the expenditures relied on by the applicants to terminate the Agreement, which they say came to light in the Certificate, were in the minutes of the Board of Directors meeting held on June 14, 2018, and were provided to the applicants pursuant to clause 2.1 of the ReSale Condominium Schedule in November 2018.

[18] The respondent claims that she incurred carrying costs related to the condominium of $11,583.96, between June 17 and November 29, 2019, as well as legal fees of $2,070 and real estate fees of $22,080. The respondent, without filing a claim of her own, is seeking $20,733.96 in damages to be offset by the deposit. Appended to the Duncan Affidavit is a listing for the condominium from The Viewpoint, indicating it sold for $15,000.00 more than the initial agreement.

ISSUES:

[19] There are two issues in this matter:

1. Did the respondent breached the Agreement by refusing to return the applicants' deposit?
2. Is the respondent entitled to the relief she requests?

LAW AND ANALYSIS:

1. Did the Respondent Breach the Agreement?

[20] Whether the respondent breached the Agreement by refusing to return the deposit depends on the interpretation of paragraph 2.3 of the Schedule. The information which must be disclosed in the Certificate is governed by section 33(1)(f)(i)-(xvii) of the *Condominium Act*, which states as follows:

> 31 (1) The corporation
>
> ...

(f) on the application of an owner or a purchaser of a unit and common interest, shall issue an estoppel certificate to which is attached copies of the declaration and by-laws of the corporation in which it shall certify

(i) the amount of any assessment and accounts owing by the owner to the corporation, and for which the corporation has a lien or right of lien against the unit and common interest of the owner,

(ii) the manner in which the assessment and accounts are payable,

(iii) the extent to which the assessment and accounts have been paid by the owner,

(iv) the unit identified by unit number, level number, condominium corporation number and any applicable civic and suite numbers,

(v) the name, address and telephone number of the condominium management company or manager,

(vi) the names and addresses of the officers of the corporation,

(vii) the current amount of common expenses, and whether they are prepaid or collected in default,

(viii) how the reserve fund is collected and, if collected as a percentage of common expenses, what that percentage is,

(ix) the balance of the reserve fund,

(x) any special assessments that are forthcoming or contemplated by the corporation within twelve months of the date of the estoppel certificate,

(xa) copies of the minutes of all meetings of the board of directors and meetings of the members of the corporation held within the previous twenty-four months,

(xi) any major capital expenditures that are planned by the corporation,

(xii) any lawsuits that have been instituted or are pending by the corporation or against the corporation,

(xiii) the debt carried by the corporation from previous expenditures,

(xiv) fire insurance, public liability and directors' liability insurance coverage and the amount or value of each policy,

(xv) the content of any proposed by-laws, proposed amendments to existing by-laws or proposed amendments to the declaration;[,]

(xvi) the name of each person who owns ten per cent or more of the common elements;[,] and

(xvii) as to such other matters as the Governor in Council may prescribe,

and in favour of any person dealing with that owner, the certificate is conclusive proof of the matters certified therein.

[21] This section indicates that an estoppel certificate is intended to constitute a comprehensive summary of a condominium corporation's financial health, including obligations, liabilities, and expenditures. It is not a mere financial statement, but constitutes proof of the condominium's financial health.

[22] The purpose of the estoppel certificate was discussed in *Little v. Condominium Plan 82S15667 (Owners)*, 2004 SKQB 50, affirmed at 2006 SKCA 56:

> [17] The prospective purchaser is naturally interested in ascertaining the nature of the financial obligations to be assumed on purchase of a unit. Concern needs to be had not only for the financial obligations pertaining to the actual unit to be purchased but also for those that arise for a tenant in common of the entire common property of the condominium complex. This latter information is primarily within the knowledge and control of The Owners.

[23] It is clear that the estoppel certificate is not an insignificant part of the property transaction. It is an important component of a condominium sale. It is proof that a purchaser can rely on concerning the condominium's financial health, obligations, and liabilities known on the date it is given. The respondent would have the court determine that the clear wording of the Agreement should be ignored, and the applicant not be allowed to terminate the agreement, once this proof of financial health is provided. If that were the case, the relevant provisions would be meaningless.

[24] There is little caselaw in Nova Scotia dealing with the effect or purpose of estoppel certificates in any detail. For instance, in *Halifax County Condominium Corp. No. 5 Cowie Hill v. McDermaid* (1982), 55 N.S.R. (2d) 414, 1982 CarswellNS 102 (S.C.T.D.), a special assessment had been authorized by the plaintiff condominium corporation before the defendants requested an estoppel certificate. The certificate did not reference the expenditure. The court held that "[h]aving requested a certificate the plaintiff is now estopped from claiming an amount not referred to in that certificate" (para. 27). In *Canada Mortgage & Housing Corp. v. Halifax County Condominium Corp.* (1982), 52 N.S.R. (2d) 579, [1982] N.S.J. No. 435 (S.C.T.D.), the court remarked that "[t]he purpose of Section 19(1)(e) is not to impose liability on a purchaser of a unit but simply to inform as to the status of the account" (para. 19). In *Re MacCulloch* (1981), 48 NSR (2d) 402, [1981] NSJ No 499, the court said, "[a]s the Contingency Fund is deemed to be realty the Vendor is obligated to ensure his assessments to the fund are paid in full before transfer. Whether or not the vendor's obligation has been fulfilled is determined by requesting

and obtaining from the condominium corporation under the provisions of s. 19(1)(e) of the Act, what is described in this province as an Estoppel Certificate

[25] It has been said that that "the purpose of an estoppel or status certificate in this context is "to ensure that prospective purchasers and mortgagees of units are immediately given sufficient information regarding the property to make an informed buying or lending decision": *Durham Condominium Corp. No. 63 v On-Cite Solutions Ltd.*, 2010 ONSC 6342, [2010] O.J. No. 5214, at para 21, citing Audrey M Loeb, *Condominium Law and Administration*, 2d edn (Toronto: Carswell, looseleaf), at 9-2.

[26] There is authority for the broad proposition that an estoppel certificate can provide a basis for a purchaser to refuse to close, and to have a deposit returned. The Ontario Court of Appeal said, in *Orr v. Metropolitan Toronto Condominium Corporation No. 1056,* 2014 ONCA 855:

> [69] ... Estoppel or status certificates are virtually never provided by the condominium corporation to the purchaser before the agreement of purchase and sale is signed. Instead, the request for a certificate or permission to request a certificate is typically contained within the agreement of purchase and sale... The contents of the estoppel certificate become relevant after the agreement of purchase and sale is signed but prior to closing. If the certificate identifies a serious breach of the Declaration, for example, then the purchaser may be able to rescind the agreement. It is now common for a purchaser to make his or her offer expressly conditional on receipt and review of the status certificate...

[27] In *Lightner v Condominium Plan No 772 3097*, 2009 ABQB 3, [2009] AJ No 9 (Alta QB), the court said (in respect of the Alberta legislation):

> 33 The term "estoppel certificate" is not used in the Act. However, a person may request a condominium corporation to provide a statement setting out certain information concerning the financial and general status of the condominium corporation, including whether an owner is up to date in its contributions. The information prevents the condominium corporation from claiming a different set of facts and is "estopped" from so doing. It is not an agreement, as it has none of the trappings of an agreement, such as an offer, acceptance and the exchange of consideration. That said, a person could rely to their detriment on the contents of the statement and could suffer damages as a result.

[28] The Ontario case of *Boschetti v. Sanzo* (2003), 26 R.P.R. (4th) 113, [2003] O.J. No. 5227 (Sup. Ct. J.) bears some resemblance to the circumstances of the present case. The purchasers sued for the return of their deposit provided to the

defendant vendor, who had warranted in the agreement of purchase and sale that there were no outstanding work orders relating to the condominium complex. However, there were, in fact, several prior outstanding work orders and additional work orders were made after the agreement of purchase and sale. On receipt of this information in the estoppel certificate, the purchasers refused to close, alleging that the vendor had breached the warranty that there were no work orders (paras. 16-17). The vendor refused to return the deposit, and counter-claimed for damages for breach of the agreement of purchase and sale. The trial judge held that "it would be unfair to the purchasers to require them to close this transaction and have as their only remedy a claim for damages against the vendor" (para. 24), as "the plaintiffs, on the date for closing, would not get what they bargained for and were within their rights to refuse to close the transaction. Pursuant to paragraph 9 of the agreement of purchase and sale the agreement was null and void" (para. 25). The plaintiff's claim was allowed. The Ontario Court of Appeal affirmed the decision: 49 R.P.R. (4th) 61, [2006] O.J. No. 3318 (C.A.). While somewhat different facts, the principle is equally applicable. How can the applicants be left to close a transaction taking on a financial burden not agreed to.

[29] Similarly, in *Jaspaul S. Sandhu Enterprises Ltd. v. Penner*, 2012 BCSC 856, the plaintiff purchasers were entitled to return of their deposit on account of deficiencies in the estoppel certificates that caused them to refuse to close the sale.

[30] In deciding the matter, I must have regard to the general principles of contractual interpretation which were considered in *Sattva Capital Corp. v. Creston Molly Corp*., [2014] 2 S.C.R. 633:

> 47 ... [T]he interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding"... To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed... . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(*Reardon Smith Line*, at p. 574, per Lord Wilberforce)

> 48 The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement... As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):
>
> > The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

[31] Recently in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, [2020] S.C.J. No. 22, the court summarized the *Sattva* principles:

> 106 It is well established that the interpretation of a written contractual provision must be grounded in the text and that the provision must be read in light of the entire contract. The surrounding circumstances can be relied on in the interpretive process, but not to the point that they distort the explicit language of the agreement...

[32] It goes without saying that owning a unit in a condominium complex entails sharing in a collective financial responsibility for the maintenance of the complex. Therefore, the sufficiency of the reserve and contingency funds are understandably of the upmost importance to the unit holders and prospective purchasers. This importance was outlined in *Condominium Plan 832 1384 (Owners) v. McDonald*, 1998 ABQB 677, as follows:

> [15] ... Here the whole condominium project is in need of repairs. The responsibility for exterior maintenance is the Plaintiff's, not individual unit owners. The cost for maintenance, regardless what maintenance, must be born by all unit owners. It would not matter whether the special assessment is two months, six months, 12 months, or whatever, down the road. All unit owners must bear their share of that special assessment regardless whose units are repaired and when the special assessment is made.
>
> [16] An owner cannot say that he is liable only for repairs to his unit. That is not the case for residential condominium projects. For example, if unit A only in a 50 unit complex is repaired the cost is borne by all 50 unit owners, not just the owner of unit A. A well managed project has an established reserve fund to cover all probable reasonable costs. Here extensive repairs are needed to all or at least a majority of the units and the reserve fund is insufficient. So the Plaintiff has to beef up the reserve fund in some way. Special assessments are one way of doing that.

> [17] The fundamental problem here is the lack of a sufficient reserve fund. I do not know if the Defendants had a lawyer when they bought the unit. People who buy a unit in a condominium project that does not have an adequate reserve fund must appreciate the probable consequences of that when they buy the unit. It is not the same as buying a detached single family residence in a non-condominium setting.

[33] Pursuant to para. 2.3 of the Schedule, the applicants were required to give notice to the respondent within three days of receipt of the Certificate. Otherwise, the applicants would be deemed to be satisfied with the Certificate. The applicants did exactly what they were enabled to do under the Certificate, that is, provide notice that they were terminating the Agreement. They made clear their election to terminate the Agreement and request the return of their deposit. The inuendo that the Applicants were merely doing this because they had not sold their home does not bear out on the evidence.

[34] It is clear that the Certificate is intended to contain further and more detailed information than what the respondent was required to provide under section 2.3 of the Schedule. The Certificate provides further detailed information to enable a buyer to make an informed decision respecting the financial health of the condominium corporation. The language in paragraph 2.3 is clear. There is no indication that there needs to be a material change in the information between what is provided under clause 2.1 and 2.3 in order for a buyer to have the right to withdraw from the Agreement.

[35] The respondent complains about the timing of the termination of the Agreement. Nothing in clause 2.3 suggests that the Certificate could not be provided earlier than the deadline. It could have been provided earlier by the respondent. The applicants' concern about the financial health of the Corporation did not crystallize until the Certificate was received and they became aware of the possibility that a special call for additional funds could be made on unit holders.

[36] It is clear from the Agreement and the surrounding circumstances that part of the bargain was delivery of a Certificate. The right to a Certificate comes with a right to review the condominium corporation's financial health, as well as a right to terminate the agreement. The respondent claims that in order for there to be a right to terminate pursuant to clause 2.3 of the Agreement, there needs to be a material change in circumstance. This would drain the provision of its meaning. To read in a material change in circumstances would be to rewrite the agreement.

[37] The applicants submit that even if there was a need for a material change in circumstances, such a change in fact occurred, in that the reserve and contingency fund, were depleted by an additional $50,000.00 between when the Agreement was signed and when the Certificate was obtained. Furthermore, additional water leakage and infiltration into the unit was discovered after the Agreement was signed.

[38] At the hearing, additional documents were entered as exhibits, by consent. These were documents that were provided to the applicants in 2018, before the Certificate was provided pursuant to clause 2.1 of the Schedule. These documents were entered by agreement and relied upon by the applicants to show the lack of reliable information given early on.

[39] The first document entered was an October 2015 Reserve Fund study prepared by BRK Engineering Inc. The BRK report indicated that as of the end of 2016 the reserve fund was at $179,000.00. This report refers to the anticipated work to be done on the condominium complex, including that work on windows would not start until sometime in 2026 or after. The report projected that in 2018 the reserve fund balance would be $274,711.00, rising to $429,265.00 in 2019. There were other reserve fund projections showing cash flow in 2019 of $261,082.00, $279,232.00 and $244,919.00. The projected costs of the window work was stipulated as $115,000.00, from the years 2026 to 2031. It appears that there was no certainty to these amounts.

[40] In the draft minutes recorded at the annual general meeting on May 25, 2017, there is a notation about building envelope maintenance, without detail; the minutes go on to say that a "notation in the Study about governors on casement windows has prompted an investigation of how many windows are without this safety feature, and what the cost will be to install them." The following remarks are also present:

> A suggestion was brought forward to communicate with residents about responsible management of their unit windows, to prevent leaks and undue heat loss, as well as potential damage to windows in the building envelope.
>
> ...
>
> Harrold summarized by saying that the project to assemble and present this information to owners was worthwhile in confirming that that Corporation is in a very healthy financial position.

[41] So, while there is some vague reference to issues, there are no real specifics about expenditures, and only an overarching statement of financial health. This does not an estoppel certificate make.

[42] Also in evidence was the statement of the Corporation's financial position as of December 31, 2017, showing a reserve fund of $185,182.00, a contingency fund of $94,140.00, and an operating fund of $17,429.00. These amounts are higher than the amounts confirmed in the Certificate. There are also minutes of a Board of Directors meeting of January 25, 2018, where there is reference to window replacement and patio door frame repair and replacement.

[43] In total, the information previously received by the applicants, as gleaned from this package of information provided to the court on the day of the hearing, is sparse, and certainly not as fulsome as was provided in the Certificate.

[44] I do not accept that the Certificate did nothing to supplement this information. The Certificate gave additional, more clear and recent information. The reserve and contingency funds had decreased – not increased – over time. The cost to fix windows was set at $150,000.00.

[45] I need not address the issue of whether there must be a material change of circumstances to permit the purchasers to withdraw, because I find that the Agreement does not import such a requirement. However, in view of the additional information provided in the Certificate, I would conclude in any event that there was a material change in circumstances, in the form of the more recent and more complete financial information provided.

2. Is the Respondent Entitled to the Relief She Requests?

[46] The respondent requested damages of $20,733.96, on account of alleged carrying costs, legal fees, and real estate fees. I am not satisfied that this claim is properly before the court, given the absence of pleadings. However, given my findings, there is no validity to the request.

CONCLUSION:

[47] Based on the interpretation of clause 2.3, in view of the factual matrix, I conclude that the respondent has breached the Agreement by refusing to return the deposit to the applicants. The applicants are entitled to a Declaration that the Agreement is of no force and effect and an order for return of their $25,000.00 deposit. I would reach the same result if there were a requirement for a material change in circumstances, though I have found no such requirement in the Agreement.

[48] If the parties cannot agree on costs, I will receive written submissions within 30 days of the release of this decision.

Brothers, J.