

CONDOMINIUMS—GOOD FAITH AND FIDUCIARY DUTIES

by Colin P. Stevenson of Teplitsky, Colson and Stevenson & Associates^{©1}

INTRODUCTION

The Ontario Court of Appeal in *Peel Condominium Corporation No. 505 et al. v. Cam-Valley Homes Ltd. et al.*², confirmed that the general law of contract and real property must be applied to condominiums, subject to terms of the *Condominium Act*, R.S.O. 1990, c. C.26³. In doing so, however, the court circumscribed prior attempts to establish a fiduciary relationship between developers, on the one hand, and condominium unit holders and corporations, on the other hand. Finlayson J.A., writing for the majority, confirmed that there is no “overarching”⁴ fiduciary duty between the developer and the condominium purchaser, just as there is none between a vendor and purchaser of more conventional real estate.

The Court of Appeal also considered the scope of the contractual duty of good faith as it applies to condominium developers. The court confirmed that in the negotiation process parties are not subject to any duty to bargain in good faith. The developer’s good faith obligation is limited to carrying out the terms of the agreement which has been made and, in particular, to delivering title in accordance with the terms of the contract.

This article will analyse the issues before the court and their significance for condominium law having regard to the new *Condominium Act*, S.O. 1998, c. 19.

THE FACTS IN CAM-VALLEY

The dispute arose as a result of a phased development in Mississauga (the Granite Gates Community) which was conceived in 1987. The original developer, Cam-Valley Developments Ltd., expected to build 750 residential units in five different condominium corporations over a number of years. The original project called for an outdoor recreation area (ORA) consisting of four tennis courts, an outdoor pool and a putting green to serve the five condominium corporations. Each condominium corporation was to have an interest in the 2.4 acres on which the ORA was to be built. When the ORA was completed this land was to be conveyed to the condominium corporations, either as a shared asset or as a unit in

¹ I would like to thank Tracey L. Hamilton, student-at-law, for her research assistance in writing this paper.

² *Peel Condominium Corporation No. 505 v. Cam-Valley Homes Ltd.* (1999), 28 R.P.R. (3d) 186 (Epstein J.), rev’d [2001] 53 O.R. (3d) 1 (Ont. C.A.). The author was counsel for the successful appellant (developer) on the appeal [hereinafter *Cam-Valley* and *Cam-Valley* (Ont. C.A.)].

³ The *Condominium Act*, S.O. 1998, c. C.19 was not then in force and was not considered by the court. The 1998 Act came into force on May 5, 2001 except for the subsection concerning annual meetings which was proclaimed July 4, 2001.

⁴ *Cam-Valley* (Ont. C.A.), *supra*, note 2 at 16f.

one of the corporations. All condominium corporations were to contribute *pro rata* to the cost of the ORA and would be entitled to use the ORA.

The first phase, a high-rise residential tower comprising 164 units, was registered on October 3, 1991 as Peel Condominium Corporation No. 447 (PCC 447). The real estate market deteriorated, however, in the early 1990's and the developer changed its plans for the overall project. In the original disclosure statement for PCC 447 the developer had reserved the right to change its plans and noted that substantially less than 750 units might be built over a very different time frame.⁵

In 1993 the original developer, under bank direction attributable to the recession, sold various parcels of the project lands to different corporations. The overall scope of the project was reduced to 440 units. One of the new developers was Cam-Valley Homes Limited (Cam-Valley), not to be confused with the original developer, Cam-Valley Developments Limited. In 1993-1994 the new Cam-Valley marketed and sold 56 townhouses in close proximity to PCC 447 and adjacent to the area where the ORA was to be built. These 56 townhouse residential units were registered on October 3, 1995 by Cam-Valley as PCC 505. PCC 505 was the applicant in this law suit.

As with PCC 447's disclosure statement, PCC 505's (February 1993) disclosure statement reserved to the declarant the right to modify the scope of the overall project and the right not to build the ORA. The significant issue was whether the developer was entitled to build residential units or to do anything on the ORA lands, if the ORA was not built.

In 1997 Cam-Valley had announced its intention to build up to 24 townhouses on part of the ORA lands. PCC 505 objected and registered a caution under the *Land Titles Act*. By the time of the Cam-Valley application in 1999 there were three registered condominium corporations: PCC 447 PCC 489 and PCC 505. At the outset, PCC 489 abandoned any possible interest in the ORA. By the time of the appeal in 2000 PCC 447 had also abandoned any interest. It should be noted that the disclosure statements for later phases, which were only being marketed during the course of the Cam-Valley litigation, did not even make reference to an ORA as it had been abandoned by Cam-Valley at that point, even though the

⁵ PCC 447's disclosure statement expressly stated that:

(a) the declarant was under no obligation to complete any portion of the project, other than PCC 447's high-rise;

(b) the ORA might never be constructed if certain terraced apartments, which were originally contemplated as part of a later phase, were never constructed.

There was no dispute that the terraced apartments were never built and that there was no obligation to build them.

original documents given to purchasers in PCC 477 489 and 505 contemplated all corporations sharing pro rata in the ORA.

After some negotiations Cam-Valley unilaterally removed the trees from the ORA lands in anticipation of construction of the new homes. PCC 505 immediately launched its application for a determination that Cam-Valley held the subject lands in trust for PCC 505 and the other condominium corporations comprising the overall project. The matter proceeded by way of application. The question of damages for misrepresentation, whether statutory⁶ or common law, was put over for trial. The application was argued based on affidavits and transcripts of examinations having regard primarily to the condominium documents.

SUMMARY OF THE COURTS' CONCLUSIONS

The application judge⁷ found that:

- (a) prospective purchasers understood or ought to have understood that recreational facilities may not be built on the ORA land;
- (b) there was no obligation to build the ORA;
- (c) there was no obligation to transfer the ORA land unless the ORA was built.

Consequently, there was no common intention that the developer held the land in trust for the condominium corporations.

The application judge also found, however, that the purchasers had a reasonable expectation that the ORA land would be left in its natural state if no recreational facilities were built. Although it was never argued, Epstein J. granted a permanent injunction restraining Cam-Valley from ever developing its lands.

In the Court of Appeal, Weiler J.A. concurred in overturning the lower court's decision but for different reasons to those of the majority. Weiler J.A. applied an expansive concept of fiduciary duty, although she had no choice but to accept the application judge's findings of fact with the result that her comments in this regard are *obiter dicta*. Weiler J.A. disagreed with the lower court's injunction remedy and found that damages would be a more appropriate remedy if, at trial, the condominium owners or corporations could show that Cam-Valley had breached its *contractual* duty of good faith.

⁶ *Condominium Act*, s. 133 (former s. 52).

⁷ *Cam-Valley*, *supra*, note 2.

The other judges in the Court of Appeal (Finlayson and Labrosse J.A.) rejected not only the remedy but also the application judge's analysis of fiduciary duty as it applied to condominium developers. The majority concluded that the developer was free to deal with the subject lands as it saw fit, subject only to a contractual duty to complete the agreements of purchase and sale in good faith. The developer was not generally subject to any fiduciary duty. The developer's obligation was to complete the agreement of purchase and sale strictly in accordance with its terms.

Before analysing the Court of Appeal decision as it applies to fiduciary duties and the contractual obligation of good faith, one other important fact must be noted. The condominium corporations argued that the developer's use of the land should be constrained by oral representations or by the parties' course of conduct. The Court of Appeal, however, found that, the claim for damages having been put over to trial, the parties were restricted to the express written representations in the disclosure statement, agreements of purchase and sale or related condominium documents (including budget statements, reciprocal agreements and similar documents).

FIDUCIARY DUTY

Prior to *Cam-Valley* there had been a tendency to impose broad fiduciary duties on condominium developers.⁸ The principal basis was the Ontario Court of Appeal decision in *York Condominium Corp. No. 167 et al. v. Newrey Holdings Ltd. et al.*⁹ In *Newrey* the court had to determine the proper ownership of a janitor's suite as well as entitlement to the proceeds of sale of certain parking spaces in the underground garage of this 90 unit residential condominium.

Galligan J. at trial concluded that registered title of this janitor's suite (in the name of the developer) could only be overcome by evidence of a *common intention* on the part of both the unit owners and the developer that the janitor's suite constituted part of the common elements or otherwise belonged to the condominium corporation.¹⁰ The court reviewed the dealings between the parties and concluded the condominium corporation had not established the requisite common intention.

⁸ See, for example: *Frontenac Condominium Corp. No. 1 v. Joe Macciocchi and Sons Ltd.* (1975), 11 O.R. (2d) 649; *York Condominium Corp. No. 167 et al. v. Newrey Holdings Ltd. et al.* (1981) 32 O.R. (2d) 458 (Ont. C.A.); *Ceolaro v. York Humber Ltd.* (1994), 37 R.P.R. (2d) 1 (Ont. Gen. Div.); *Wellington Condominium Corporation No. 61, v. Marilyn Drive Holdings Limited* (1994), 20 O.R. (3d) 81 (Ont. Gen. Div.); and *Middlesex Condominium Corporation No. 87 v. 600 Talbot Street London Ltd.* (1998), 37 O.R. (3d) 22 (Ont. C.A.); varied on other grounds, (1998), 37 O.R. (3d) 1 (Ont. C.A.).

⁹ (1981), 32 O.R. (2d) 458 (Ont. C.A.), leave to appeal to the Supreme Court of Canada refused, June 15, 1981 [hereinafter *Newrey*].

¹⁰ *Newrey* per Galligan J. at 460 applying *Frontenac Condominium Corp. No. 1 v. Joe Macciocchi and Sons Ltd.* (1975), 11 O.R. (2d) 649.

The Court of Appeal, however, took a hard look at the same evidence and, in particular, the agreements of purchase and sale and plans filed with the municipality which described the suite as “the janitor’s suite” and reached the opposite conclusion.¹¹

Wilson J.A. first applied traditional principles of real estate law and stated:

“It seems to me that as soon as a unit purchaser enters into an agreement of purchase and sale he becomes the equitable owner of the unit and the interests appurtenant thereto even though the agreement cannot be closed until registration of the declaration. By signing an agreement of purchase and sale each unit purchaser acquires in equity:

- (1) the unit described in his agreement of purchase and sale;
- (2) the right to the exclusive use and possession of one parking space to be designated by the condominium corporation;
- (3) the right to the exclusive use and possession of such additional parking space as may be purchased by him and designated by the condominium corporation.

In my view, the respondent developer could not, either before or after the registration of the declaration, deal with any part of the common elements so as to defeat the unit purchasers’ equitable interest in them.”¹²

Wilson J.A., however, then made another statement which introduced an expanded concept of fiduciary duty into the law of vendor and purchaser as applied to condominiums:

“I do not think the position of the owner-developer remains unchanged after he starts to sell units. I think that at that point he has committed the character of the project to that of condominium under the Act and declaration. I think he has also placed himself in a fiduciary relationship to the unit purchasers not only with respect to their units but also with respect to the interests appurtenant thereto. He therefore holds the property in trust for the unit purchasers, present and prospective, and for the condominium corporation which will come into being upon registration of the declaration. *I believe he*

¹¹ The court noted that there was no dispute that the additional parking spaces formed part of the common elements. *Newrey, ibid.*, at 465.

¹² *Newrey, ibid.*, at 466.

*is under a duty to protect the interests of all unit owners, present and prospective, and cannot put his own interests in conflict with theirs even although he himself continues to be an owner as long as any units remained unsold.*¹³ [Emphasis added.]

The Court of Appeal again concluded that the janitor's suite could not be retained by the developer and had to be transferred to the condominium corporation upon registration of the declaration.

The Court of Appeal considered these issues in detail in 1998.¹⁴ The court noted that *Newrey* "questioned" the extent to which the ordinary law of contract and real property applied to condominium purchases.¹⁵ The court in *Talbot Street* stated:

"To summarize, *Frontenac* and *Newrey Holdings* stand for the proposition that with respect to the common elements the declarant is bound not to prefer its interests over those of the group of unit owners. Where the reasonable interpretation of the evidence is that, notwithstanding the registered title, the declarant intended a reasonable purchaser to believe or to justifiably assume that the superintendent's suite was a common element or an asset of the corporation, the declarant will be required to convey the unit to the corporation. If this constituted a departure from established contract and real property law, it was a departure required by the exigencies of condominium ownership."¹⁶

It is submitted, however, that the *ratio decidendi* of the *Newrey* decision did not constitute a departure from established principles, as none was necessary. Wilson J.A. was writing, however, before the introduction of a statutory obligation to produce a disclosure statement,¹⁷ which may explain the breadth of her statements. Rosenberg J.A. in *Talbot Street* and *Marilyn Drive* obviously considered it was not unreasonable to apply fiduciary principles to

¹³ *Newrey, ibid.*, at 467.

¹⁴ *Wellington Condominium Corp. No. 61 v. Marilyn Drive Holdings Ltd.* (1998), 37 O.R. (3d) 1 (Ont. C.A.) [hereinafter *Wellington Condominium Corp.*] and *Middlesex Condominium Corp. No. 87 v. 600 Talbot Street London Ltd.* 1998, 37 O.R. (3d) 22 (Ont. C.A.) [hereinafter *Middlesex Condominium Corp.*].

¹⁵ *Middlesex Condominium Corp., ibid.*, at 34(e).

¹⁶ *Ibid.*, at 34 and 35.

¹⁷ The original Act was enacted in 1967 (S.O. c.12). The disclosure statement was introduced in 1974. The Act was replaced by the *Condominium Act*, 1978, S.O. c. 84. It was the replacement version, as amended, which was in force at the time of the *Cam-Valley* decision. The history of the Act is disclosed in detail in *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1992), 96 D.L.R. (4th) at 459-461.

condominium developers, although the court did not have to consider these principles directly having regard to the facts of these cases.

THE NEW APPROACH

In hindsight it might have been better for the court in *Newrey* simply to have said that ordinary principles of contract and real property continue to apply, albeit in conjunction with the express provisions of the *Condominium Act*. The latter approach has now been confirmed by the majority in *Cam-Valley*. Even if Wilson J.A. had been attempting to expand the law in 1981 *Finlayson J.A.* has now stated that:

“However to the extent that Wilson J.A.’s statement can be read along with her earlier statements in *Newrey* to hold that the developer is in a fiduciary relationship with prospective unit holders, this position is unsupported by the general law and is contradicted by recent decisions: see *Simone v. Daley* (1999), 170 D.L.R. (4th) 215 (Ont. C.A.); and see generally *Martel Building Ltd. v. Canada*, 2000 S.C.C. 60.”¹⁸

The law has now been succinctly stated as follows:

“The developer does not hold the condominium property in trust for the purchaser of the unit, it holds the *title* to the unit in trust for the prospective purchaser who has executed an agreement of purchase and sale to purchase a unit. The developer’s good faith obligation, or duty, is to carry out the terms of the agreement and deliver whatever title the contract between the parties calls for. This obligation or duty is circumscribed by the documentation required by the *Condominium Act*. The purchaser, for his or her part, has an equitable interest in the unit by virtue of the agreement that is signed; an equitable interest that equity will enforce by specific performance. However, there is no overarching fiduciary duty arising out of the relationship of a vendor and purchaser as such.”¹⁹

It is submitted this approach is consistent with the *ratio decidendi* in the significant cases in this area. In *Talbot Street* the court ordered specific performance of the agreements of purchase and sale because the condominium documents (which included a disclosure statement) evidenced an intention that the superintendent’s unit was to be a common element or an asset of the corporation. Consequently, the developer was ordered to convey the unit

¹⁸ *Cam-Valley* (Ont. C.A.), per Finlayson J.A. at 14.

¹⁹ *Cam-Valley* (Ont. C.A.), per Finlayson J.A. at 16

and its appurtenant parking space to the corporation to be held as an asset, i.e., specific performance of the terms of the express agreement was granted.²⁰

The court applied an objective test to interpret the condominium documents to identify the true agreement between the parties.²¹ This is unchanged by *Cam-Valley*.

In *Wellington Condominium Corporation No. 61 v. Marilyn Drive*, the issue had been whether a superintendent's suite was owned by the developer or the condominium corporation. At first instance the trial judge concluded:

(a) there was no common intention that the superintendent's suite was a common element or otherwise an asset owned by the corporation free of charge;

(b) the developer ought, however, to have disclosed the possibility that the corporation could acquire the subject unit from the developer at its fair market value of approximately \$125,000.00 (similar to Epstein J.'s conclusion at first instance in *Cam-Valley* that the developer must disclose in clear, unambiguous terms that the adjacent lands might be developed for residential purposes);

(c) the corporation had failed to prove either that it suffered any damages as a result of the material omission or, if it did, the amount of those damages.²²

The Court of Appeal, in *Marilyn Drive*, concluded that the trial judge erred in:

- (a) finding that the developer's failure to disclose the possibility that it would sell the unit to the condominium corporation was a material omission; and,
- (b) failing to conclude that the developer was liable for damages pursuant to s. 52(5) as a result of a different material omission; namely, the omission from the budget statement²³ of any reference to the expenses associated with providing accommodation for the resident superintendent.²⁴

Thus, the developer was not liable for omitting to disclose that the corporation might have to purchase the superintendent's unit from the developer.

²⁰ *Middlesex Condominium Corp.*, *supra*, note 14 at 39(c).

²¹ *Ibid.*, at 35(h).

²² *Wellington Condominium Corp.*, *supra*, note 14.

²³ Budget statement as mandated by former s. 52(7), now s. 72(3)(q).

²⁴ *Wellington Condominium Corp.*, *supra*, 14 at 16.

This brings us back to *Cam-Valley*. If the developer in *Marilyn Drive* was not liable for omitting to disclose the corporation might have to purchase the superintendent's unit from the developer, Cam-Valley should not be liable for omitting to disclose that its land might be used to construct townhouses if the ORA was not built. This was not expressly stated by any of the judges.

Obviously, if the developer *expressly* reserved the right to develop the lands for residential purposes it should be free to pursue such a project. The majority in the Court of Appeal found that there was such an express reservation, although Epstein J.'s analysis to the contrary is compelling.

Arguably, neither the PCC 505 disclosure statement nor any of the other applicable disclosure statements said what would be done with the land earmarked for the ORA if the ORA was not constructed. If so, was the developer still free to deal with this land as it saw fit, subject only to any planning constraints? Alternatively, was this land sterilized, to be left in its natural state if the ORA did not proceed? A central question which was not directly addressed by any court was whether a developer which sets out in the disclosure statement one potential use for lands adjacent to the condominium project (the ORA) must expressly identify all potential uses for those lands (e.g., residential development), or is the developer's ownership sufficient to reserve all possible alternative uses?

It is submitted that the latter is true and in the absence of an express commitment to transfer land or units to the condominium corporation the registered owner should be free to deal with its own land as it sees fit.

In *Cam-Valley* the application judge had found that the declarant did not intend the purchasers to believe the ORA would inevitably be built or that the lands would be conveyed in any event. Based on the prior case law all judges agreed that specific performance could not be ordered in the absence of a common intention that the condominiums should own the land if the ORA was not built.

In the Court of Appeal Weiler J.A., however, attempted to make hay from another finding by the application judge to the effect that Cam-Valley:

“ . . . never intended a reasonable purchaser to conclude that it planned to develop the ORA lands for use other than as a recreation facility”.²⁵

Weiler J.A. took this finding of an *absence* of intention on the part of the developer to support a “reasonable expectation” on the part of a purchaser that the lands would be left

²⁵ *Cam-Valley* (Ont. C.A.), *supra*, note 2 at 26, Weiler J.A. quoting Epstein J.

undeveloped if the ORA was not built.²⁶ It is submitted this extrapolation was unreasonable, inconsistent with *Marilyn Drive* and inconsistent with general principles of contract and real estate law. In the absence of a reasonable expectation that the lands would be transferred the condominium corporation had no cause for complaint.

It is submitted the only coherent theory that might have been applied in favour of the condominium corporation was either:

(a) there was a common intention to transfer the subject lands even if the ORA was not built; or

(b) the parties intended the lands would not be used for any purpose other than as an ORA, in which case specific performance could be granted to enforce a restrictive covenant, if all the constituent elements for a restrictive covenant were present.

The application judge did not refer to the possibility of a restrictive covenant, nor did Weiler J.A. who considered liability for breach of contract (based on the requirement to perform the contract in good faith) but rejected the remedy of an injunction in favour of a claim for damages only.

A permanent injunction was clearly not an appropriate remedy. A permanent injunction does not run with the land, unlike a restrictive covenant. The inappropriateness of the injunction is illustrated by the reality that the developer could have sold the land to a third party who would have been free to develop the land for residential purposes.²⁷

Epstein J. held that the developer was not subject to a fiduciary duty.²⁸ Weiler J.A., however, not only contemplated imposing a fiduciary obligation on the developer but even broadened its scope, compared to prior case law. Although unable to avoid the application judge's finding that there was no fiduciary relationship in the circumstances of this case²⁹ Weiler J.A. not only disagreed with the majority in the court of Appeal, but concluded that a full blown fiduciary relationship between a developer and a condominium corporation was readily conceivable:

²⁶ *Ibid.*, at 26 per Weiler J.A.

²⁷ *A.G. v. Birmingham Tame and Rea Drainage Board*, [1881] 17 Ch. D. 685 (C.A.) per Jessel, M.R. In any event, an injunction is not the appropriate remedy where a contract is ambiguous, *Kidston v. Sterling & Pitcairn Ltd.*, [1920] 61 S.C.R. 193.

²⁸ *Cam-Valley*, *supra*, note 2 at 200 and 201.

²⁹ *Cam-Valley* (Ont. C.A.), *supra*, note 2 per Weiler J.A. at paras. 78, 79 and 86.

“Whether or not a fiduciary duty exists is a question of fact: *Hodgkinson; Lac Minerals v. International Corona Resources Ltd.*, [1989] 2 S.C.C. 574 at 648. Factors in the evidence that would support the imposition of a fiduciary duty on the Developer not to prefer its interests over those of the unit holders at this stage include:

- (1) the fact that the Developer had a discretion whether or not to build recreational facilities on the ORA;
- (2) the Developer exercised power and control over the ORA;
- (3) PCC 505 unit holders were obliged to rely on the Developer’s discretion respecting the ORA *after* they purchased their units;
- (4) the credence and reliance the unit holders were likely to give the Disclosure Statement combined with what they were told at the time of purchase; and
- (5) the Developer possessed information concerning the future development of the project not readily accessible to the PCC 505 purchasers.”³⁰

It is implicit in Weiler J.A.’s reasons that she would have been more than ready to impose a fiduciary duty on the developer but for the application judge’s determination that no such duty was owed in this case.³¹ As set out above, Weiler J.A., relied on five particular facts. These will be considered in turn:

1.The developer had a discretion whether or not to build recreation facilities on the ORA.

The existence of a discretion *per se* cannot create a fiduciary duty, otherwise every contractual option, statutory power, prosecutorial discretion or similar situation would form the basis for a fiduciary relationship. Nonetheless, it is obviously a constituent element of any fiduciary duty.³²

2.The developer exercised power and control over the ORA.

³⁰ *Ibid.*, at para. 85 per Weiler J.A.

³¹ *Ibid.*, at para. 85 per Weiler J.A.

³² *Frame v. Smith*, [1987] 2 S.C.R. 99.

This point appears to add nothing to the first point. If the point is that the developer was the registered owner of the lands this hardly is a factor in imposing a fiduciary relationship in the absence of a common intention to transfer the lands.

3.PCC 505 unit holders were obliged to rely on the developer's discretion respecting the ORA after they purchased their units.

It cannot matter whether the discretion existed before or after completion of the purchase. While a fiduciary relationship could arise after completion of the purchase when it did not previously exist the timing of its appearance does not distinguish a fiduciary duty from, say, a "mere" contractual duty. While the timing of this disclosure can be relevant for some limited purposes, e.g., to determine whether there is a claim for rescission or only for damages, the real question must be whether there is any basis for liability. The timing of disclosure by itself cannot create a fiduciary obligation.

4.The credence and reliance the unit holders were likely to give the disclosure statement combined with what they were told at the time of purchase.

The Act required a disclosure statement. The Act did not and does not impose a fiduciary duty on the developer when drafting this document. The Act gives various remedies for breach of a disclosure statement. What the unit holders were told at the time of purchase may give rise to various remedies but the document by itself does not generate a particular vulnerability or evidence the necessary reliance. It is submitted that a judge will have to identify unusual features in a particular situation to establish the combination of the requisite degree of vulnerability and reliance to support a finding of a fiduciary relationship. The requisite degree is not found in the simple fact of a condominium transaction (per Finlayson J.A.) and representations cannot create and are separate and distinct from vulnerability or reliance.³³

5.The developer possessed information concerning the future development of the project not readily accessible to the PCC 505 purchasers.

The Act requires certain material information be put in the disclosure statement. Material non-disclosure or positive misrepresentation gives rise to various remedies. Opposing parties in contractual negotiations or during the implementation of contracts

³³ It should be noted that the question of whether oral representations or a course of conduct between the parties can constitute evidence of the parties' agreement should also be determined in accordance with standard principles of contract and real estate law. Thus, the question of the admissibility of such evidence will depend on whether the condominium documents, including the agreement of purchase and sale, contain "entire agreement" clauses, the terms of such clauses as well as the application of the parol evidence rule, the Statute of Frauds and any other applicable rule, doctrine or principle.

almost always have different degrees of access to material information. Weiler J.A.'s point in *Cam-Valley* cannot be that the developer had extra information—which did not help it foresee the economic downturn—but that the developer had a discretion with respect to the development of the ORA and that it abused that discretion. What is missing from Weiler J.A.'s analysis is the basis of the vulnerability or other factors which would make the developer's conduct a breach of a fiduciary duty and not just a breach of a contractual duty of good faith implementation of the agreements.

THE BASIS FOR A FIDUCIARY OBLIGATION

As pointed out by Finlayson J.A., there is nothing innate in the relationship between a developer and a condominium purchaser which evidences a fiduciary relationship (such as exists between a solicitor and client, principal and agent or trustee and beneficiary). To the contrary, the relationship is obviously an adversarial one between arm's length parties.

The *Condominium Act* could have imposed a fiduciary duty on developers to act in the utmost good faith towards purchasers or to subjugate their interests to those of the purchasers in all or various respects. The legislature did not do so, except to the extent the Act imposes various limited fiduciary obligations on developers such as holding deposit monies in trust.³⁴

While both the application judge and Weiler J.A., referred only to the consumer protection objectives of the Act³⁵ the majority in the Court of Appeal adopted a broader approach to interpreting the Act. Finlayson J.A. stated:

“... the trial judge's emphasis on the *Condominium Act* as having 'consumer protection objectives' does not reflect the balance that this court has said exists between that goal and the commercial realities of the condominium industry. The basis of the relationship is set out more accurately by Robins J.A. for this court in *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1992), 10 O.R. (3d) 120. He held on behalf of the court at p. 145:

While I may generally agree with the learned judge's critique of the legislation, I am unable to accept his approach to the current disclosure requirements. In my respectful opinion, this approach fails to construe s. 52 in a manner that properly balances consumer protection and the commercial realities of the condominium industry and, if adopted, would require a

³⁴ See, for example, ss. 78, 80 and 81 of the 1998 *Condominium Act* regarding trust monies.

³⁵ *Cam-Valley*, *supra*, note 2 at 203 per Epstein J. and *Cam-Valley* (Ont. C.A.), *supra*, note 2 at 13-16 per Finlayson J.A.

disclosure document incompatible with the underlying aim of the section.”³⁶

The fact that the Act imposed disclosure requirements³⁷ and did not impose fiduciary duties of the kind contemplated by Weiler J.A.³⁸ should suggest that the opportunities for imposing a fiduciary duty on a developer are few and far between.

In *Hodgkinson v. Simms*³⁹ LaForest J., discussed two types of fiduciary relationships. The first category is relationships which are innately fiduciary such as the solicitor-client relationship. The second category is fiduciary relationships arising “as a matter of fact out of the specific circumstances of that particular relationship”.⁴⁰

As Finlayson J.A. noted in *Cam-Valley*, there is nothing innate in the relationship between a developer and a condominium purchaser which gives rise to a fiduciary relationship. Consequently, the existence of a fiduciary relationship must arise only from the peculiar facts of any particular case. It is submitted that having regard to *Hodgkinson*⁴¹ a developer should only be liable to a condominium purchaser or corporation where the facts establish at least that the latter is “peculiarly vulnerable”⁴² and in a position of “total reliance” on the developer.

The point ultimately is that, as a general proposition, a condominium purchaser is not peculiarly vulnerable or totally reliant on the developer. The purchaser can retain a solicitor to review all material documents. The purchaser can review the status of the project with the municipality and all other regulatory authorities. The degree of vulnerability and even which party is vulnerable will vary according to the economic circumstances of the parties and the stage of the economic cycle. For example, one of the PCC 505 unit holders was a former director of a major chartered bank, presumably with significant assets. Another was a world-

³⁶ *Cam-Valley* (Ont. C.A.), per Finlayson J.A. at 13, para. 34.

³⁷ In particular, the disclosure statement in s. 52(6) (now s. 72(1)), budget statements s. 52(7) (now s. 72(6)) and corollary remedies such as damages for misleading statements s. 52(5) (now s. 72(3)(q)) and the right of rescission s. 52(2) (now s. 73).

³⁸ To similar effect see also articles such as T. Rotenberg, *Fading and Fudging the Fiduciary Duty*, 28 R.P.R. (3d) 207.

³⁹ [1994], 3 S.C.R. 377, 177 D.L.R. (4th) 161 [hereinafter *Hodgkinson*].

⁴⁰ *Ibid.*, D.L.R. (4th), at 176-177.

⁴¹ See also *Frame v. Smith and Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14.

⁴² *Hodgkinson*, *supra*, note 39, D.L.R. (4th), at 218-219.

renowned architect. The original developer, Cam-Valley Homes, became insolvent and was obliged by the banks to transfer its assets in a “soft” receivership. Who were the vulnerable parties in these circumstances? If a purchaser is unwilling to pay a solicitor to read all the documents in detail why should the developer be said to be taking improper advantage of the situation?

This is not to say that a fiduciary duty may never arise between a condominium purchaser and a developer. It is hoped, however, that the majority decision in *Cam-Valley*⁴³ will reduce the inclination to find fiduciary duties lurking in every corner of a condominium development.

THE DUTY OF GOOD FAITH (CONTRACTUAL, NOT FIDUCIARY)

The application judge stated:

“The purchaser is entitled to expect that the developer, in recording the agreements of the parties in terms of all of the reasonable expectations, does so with regard to serving the interest not just of the developer but of the purchaser as well.”⁴⁴

However, as Finlayson J.A. pointed out there is a need:

“To draw a bright line between the status of the respective developer and purchaser prior to executing a binding agreement of purchase and sale and the obligation of the contracting parties to complete the closing of the sale in good faith.”⁴⁵

Finlayson J.A. made it clear that it is wrong to suggest that the developer has an obligation to incorporate the purchaser’s “reasonable expectations” into the disclosure documents or, for that matter, the closing documents. As a general proposition there is no duty to bargain or negotiate in good faith⁴⁶—as opposed to carrying out the terms of the agreement and delivering title, to the extent required by the contract, in good faith.

It is submitted there is nothing startling in denying a duty to negotiate in good faith but confirming the contractual, but not the fiduciary, duty to complete an executory contract in

⁴³ Together with the analysis of the Court of Appeal in *Simone v. Daley* (1999), 43 O.R. (3d) 511 (Ont. C.A.) and the Supreme Court of Canada’s analysis in *Martel Building Ltd. v. Canada*, [2000] S.C.C. 60.

⁴⁴ *Cam-Valley*, *supra*, note 2 at 203, para. 57 per Epstein J.

⁴⁵ *Cam-Valley* (Ont. C.A.), *supra*, note 2 at 14, para. 38.

⁴⁶ See cases cited by Finlayson J.A. at 40 and, in particular, *Martel Building Ltd.*, *supra*, at p. 24. See also *EdperBrascan Corp. v. 117373 Canada Ltd.* (2000), 50 O.R. (3d) 425 (S.C.J.).

good faith. In this there is no real difference between Finlayson J.A. and Weiler J.A. It is unlikely that Finlayson J.A. would dispute Weiler, J.A.'s statement:

“ . . . I would nevertheless uphold Epstein J.'s imposition of a duty of good faith on the developer. The imposition of a duty of good faith obliges the developer to exercise its ownership rights with respect to the ORA land with candour and in a reasonable manner taking into consideration the interests of the PCC 505 condominium owners in having the land left in its natural state.”⁴⁷

This statement is uncontentious so long as Weiler J.A. was referring to a contractual duty of good faith and not a fiduciary duty of good faith. Cam-Valley always acknowledged that it undertook in its original disclosure statements to provide certain recreational amenities, although it reserved the right not to do so. The developer could not arbitrarily and capriciously exercise its discretion to abandon the ORA and substitute residential townhouses, even though the lands belonged to the developer.

The developer, in exercising its undoubted discretion, ought to be able to have regard to considerations such as:

(a) the concerns of the other existing condominium corporations (which disliked the proposed facilities because of their maintenance costs);

(b) the response from potential purchasers in the condominium corporation still to be developed (who were not supportive of the proposed amenities for similar reasons);

(c) although the developer abandoned the original concept of the ORA, it offered certain alternative facilities to PCC 505 *pro rata* according to their share of the project (56 units out of the originally anticipated 750 units).

It should also be remembered that the remaining phases of the project were now under the control of different corporations as a result of the economic downturn and the original developer's "soft" receivership. A significant factor would have been whether this developer controlled the entire project and the scope of the ORA.

Furthermore, condominium owners and condominium corporations must themselves also be subject to a contractual duty of good faith. Cam-Valley raised the issue that the owners acted in bad faith when:

(a) they registered a caution against the lands;

⁴⁷ *Cam-Valley (Ont. C.A.)*, *supra*, note 2 at 19 and 20, para. 56.

- (b) did not commence proceedings for two years;
- (c) admitted they did not want the recreational amenities and really wanted the lands preserved in their natural state;
- (d) initiated the application only when pre-development commenced so as to frustrate the developer's plans to build 20 townhouses.

The question of whether any of the parties breached their contractual duty of good faith would have been determined at trial. This will never be answered as the matter has now been settled. The Court of Appeal's decision in *Cam-Valley* concerning the contractual duty of good faith was unanimous and relatively uncontentious. The court confirmed that no such duty existed in the pre-contractual, negotiating stage but the parties to a contract must implement its terms in good faith, although the scope of that duty was not explored due to the bifurcated nature of the proceeding.

NEW ACT

The new Act does not create any new fiduciary duties. The amendments with respect to the disclosure statement⁴⁸ do not detract the reasons of the Court of Appeal in *Cam-Valley*. Nonetheless, the balance between the rights of developers and unit owners has been considerably modified by the new oppression remedy section in the 1998 Act which provides:

- 135(1) An owner, a corporation, a declarant or a mortgagee of a unit may make an application to the Superior Court of Justice for an order under this section.
- 135(2) On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant it may make an order to rectify the matter.
- 135(3) On an application, the judge may make any order the judge deems proper including,
 - (a) an order prohibiting the conduct referred to in the application; and,
 - (b) an order requiring the payment of compensation.

⁴⁸ *Condominium Act*, 1998, ss. 72-74, 113, 143, 147, 161 and 169.

This section does not just apply to the administration of the condominium corporation. Developers are clearly covered. It is submitted that the analysis in *Cam-Valley* will be relevant to the orders to be granted by judges on any oppression remedy applications. It is readily apparent, however, that even though a developer may not be subject to a fiduciary duty, a judge sympathetic to condominium purchasers may avail of this section to grant injunctions or other relief which would otherwise be unsupportable. It is certainly arguable that Epstein J.'s original injunction might have been sustainable under s. 135. It is to be hoped that in applying this section the court will have regard, in particular, to the Court of Appeal's direction that the Act (which should encompass the new Act), is supposed to balance the consumer protection interests of purchasers with the commercial realities of the condominium industry.

CONCLUSION

The *Cam-Valley* decision adds little to the concept of the contractual duty of good faith. The court confirmed the traditional view that the parties are subject to a contractual duty of good faith in the performance of existing contracts and are not subject to any duty of good faith when negotiating a contract.

The majority also confirmed that the *Condominium Act* must be interpreted having regard not just to the policy of consumer protection but also having regard to the interests of the development industry. Finally, the court confirmed that developers generally do not owe any fiduciary duty to condominium purchasers or corporations, whether prior to or after the contract has been concluded.

It is submitted that the circumstances under which any condominium developer is found to be subject to a fiduciary duty should be rare:

(a) as general principles of real estate or contract law do not impose any "overarching" fiduciary duty;

(b) having regard to the innate adversarial nature of the relationship between these parties; and

(c) considering the lack of any reasonable basis upon which to establish a sufficient degree of combined vulnerability and reliance in most circumstances.

The Act has not imposed any general concept of the fiduciary duty on developers nor has it imposed anything akin to the concept of "utmost good faith", as, for example, in the *Insurance Act*⁴⁹. It remains to be seen, however, whether the oppression remedy in the new

⁴⁹ *Insurance Act*, R.S.O. 1990, c. I.-8, s. 393.

Condominium Act will provide a general judicial discretion which may be interpreted by some judges as a means to avoid the intellectual rigour of the *Cam-Valley* decision.
