

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CIBC MORTGAGE CORPORATION

Plaintiff

- and -

NAIMEE KILABUK - BOURASSA

Defendant

MEMORANDUM OF JUDGMENT

[1] The plaintiff seeks a final order of foreclosure. Before that can issue a point about priority has to be settled.

[2] The subject property is a condominium unit. Yellowknife Condominium Corporation No.8 is the corporate body which collectively controls the project of which the property is part. The Corporation has filed a lien against the property claiming unpaid condominium fees of \$1,295.00 from the registered owner of the property, the defendant. The question before me relates to the priority of this lien as opposed to the plaintiff's mortgage interest.

[3] The *Condominium Act*, R.S.N.W.T. 1988, c.C-15, provides that a condominium corporation shall assess and collect the owners' contribution towards the common expenses as regulated by the corporation's declaration and by-laws: s.19(1)(b). The corporation has the right to recover from any owner the unpaid amount of any assessment by way of an action for debt: s.19(1)(d). The corporation has a right of lien for the unpaid amount as provided by s.19(1)(e):

19.(1) A corporation shall ...

(e) have a right of lien for the unpaid amount of any assessment or account that the corporation has the right to recover from the owner under paragraph (d), which right of lien shall, on registration of a notice of lien, be a lien against the unit and common interest of the defaulting owner, and have priority over all encumbrances unless otherwise provided in the declaration; (emphasis added)

[4] Counsel for the Corporation made a very thorough argument to support its claim to a priority. She submitted that the Act stipulates a priority to the lien unless otherwise provided in the declaration. The declaration in this case contains no provision respecting waiver of its priority lien right. Hence, according to her argument, the legislation governs.

[5] The plaintiff's counsel submitted, however, that the Corporation effectively waived its right to priority, not in its declaration, but in its by-laws. The by-laws contain two pertinent provisions in clauses 8.02(a) and (e):

(a) The Corporation shall and does hereby have a lien and charge against the estate or interest of any Owner for any unpaid contribution, assessment, installment or payment due to the Corporation, which lien shall be a lien against such estate or interest subject only to the rights of any registered Mortgagee and any municipal or local authority in respect of unpaid realty taxes, assessments or charges of any kind against the Unit title or interest of each Owner...

(e) Notwithstanding all other provisions hereof, the lien, charge or security created, as hereinbefore mentioned, and referred to in the preceding paragraphs, shall be subject always and subordinate to, and shall not affect the rights of the holder of, any indebtedness secured by any registered mortgage and the Corporation or other party shall, upon the request of such registered Mortgagee, at the expense of such other party execute and deliver such postponements, agreements or instruments of subordination as the said Mortgagee shall reasonably require to fully and effectively establish or maintain its priority as a registered Mortgagee in respect of a Unit title against which it has registered its mortgage;

[6] The concept of "waiver" is long-recognized in law. It is succinctly summarized in P.A. Côté, *The Interpretation of Legislation in Canada* (2nd ed.), at page 207:

An individual may waive the benefit of a right enacted in his favour: *quilibet licet remuntiare juri pro se introducto*. An application of this general principle is confined to situations where the statute has been enacted in the sole interest of one individual or of a

category of individuals. But it is not possible to dispense with a statute which has been partially or entirely adopted in the public interest.

In *City of Toronto v. Russell*, the Privy Council held that a taxpayer could waive the right to receive a notice of the sale of his immoveables for non-payment of taxes. The notice was required by law for the sole protection of the owner. *Russell* had waived his right, not expressly or in written form, but simply by his behaviour.

More recently, it was held that a taxpayer can validly waive his right to appeal an assessment made for income tax purposes. The taxpayer had, in writing, admitted his liability to taxation. Collier J. said:

...the taxpayer's right to appeal assessments is a private right, and not a public right in the sense that the appeal provisions in the Act express a public policy.

The right to waive application of a statute exists only if the provision is not one of public policy, and if this has not been expressly forbidden by the statute itself. (citations omitted)

[7] The general principle is that everyone has the right to waive and to agree to waive the advantage of a law made solely for the benefit and protection of the individual in his private capacity. Where the rights given are private rights, and unless there is a clause in the statute excluding the power to contract out, then the rights may be renounced by contract or by voluntary renunciation: *Equitable Life Association v. Reed*, [1914] A.C. 587.

[8] Can the Corporation be deemed to have waived its right to a priority? In my opinion the answer is "yes".

[9] The *Condominium Act* is not a statute of "public interest" as that term is known in the jurisprudence. It is a statute enacted for a private class of people, those being the owners of, and others dealing with, condominium property. The statute does not prohibit waiver of the priority right in any manner other than in the declaration. Here the by-laws evidence a clear and general intention to waive reliance on the priority right given by the statute. The Corporation cannot now evade that intent when it chose to put the waiver in its by-laws instead of in its declaration. In my opinion a waiver can be just as effective if made in some other clear manner.

[10] For these reasons I conclude that the plaintiff has priority over the Corporation's claim to unpaid assessments. A declaration will issue to that effect. This does not, of

course, affect the Corporation's right to recover the amount owing from the owner through an action for debt.

[11] The plaintiff shall also have its final order of foreclosure and the relief sought in its Notice of Motion filed on January 27, 1998. There will be no costs of this motion as between the plaintiff and the Corporation.

[12] Dated this 9th day of February 1998.

J.Z. Vertes,
J.S.C.

Counsel for the Plaintiff: S.A.E. Kay
Counsel for the Yellowknife
Condominium Corp.No.8: L. Dragon (Student-at-Law)
No one appearing for the Defendant

CV 07040

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

CIBC MORTGAGE CORPORATION

Plaintiff

- and -

NAIMEE KILABUK-BOURASSA

Defendant

MEMORANDUM OF JUDGMENT OF THE
HONOURABLE JUSTICE J.Z. VERTES
