

**Windisman v. Toronto College Park Ltd.  
Toronto College Park Ltd. v. Windisman et al.  
[Indexed as: Windisman v. Toronto College Park Ltd.]**

28 O.R. (3d) 29  
[1996] O.J. No. 552  
Court File No. 93-CQ-38966  
**Ontario Court (General Division),**  
**Sharpe J.,**  
February 13, 1996

*Equity — Unjust enrichment — After final closing of sale of condominium units, condominium developer held liable to pay additional interest on deposits for residential units and to pay interest on deposits for parking and storage units — No contractual basis for readjustment of terms of closing — Developer seeking to readjust terms of closing based on principles of unjust enrichment — Claim based on unjust enrichment dismissed — No benefit conferred on purchasers or detriment suffered by developer — Juristic reason for any benefit conferred — Developer closing transaction based upon assessment of risks not entitled to reopen transaction on grounds of unjust enrichment when risks turn out differently.*

*Real property — Condominiums — Interest — Obligation of developer of condominium to pay interest at prescribed rate on deposit paid by purchaser for "a proposed unit for residential purposes" — Interest payable on deposit for residential units — Interest also payable on deposits for parking and storage units — Compound interest not payable — Condominium Act, R.S.O. 1980, c. 84, s. 53.*

*Statutes — Interpretation — Principles of interpretation — Meaning of "residential purposes" — Obligation of developer of condominium to pay interest at prescribed rate on deposit paid by purchaser for "a proposed unit for residential purposes" — Interest payable on deposit for residential units — Interest also payable on deposits for parking and storage units — Compound interest not payable — Condominium Act, R.S.O. 1980, c. 84, s. 53.*

The defendant was the vendor and declarant of a multi-purpose, including residential, condominium project in downtown Toronto. Marketing of units began in 1986, and the defendant required purchasers to take interim occupancy during the spring of 1989. Final closings were in August and September 1990. In accordance with the Condominium Act and the agreements of purchase and sale, the defendant charged purchasers an interim occupancy fee. The fee was based on a mortgage to be given back on closing (sometimes based on a "phantom mortgage", where the purchaser was not giving back a mortgage) and on reasonable estimates for municipal taxes and projected common area expenses. The defendant was obliged by s. 53(3) of the Act to pay interest on the purchaser's deposits at the prescribed rate during the interim occupancy period.

As at the time of the final closings, there were several unsettled legal and factual issues and pending cases about the interpretation of the Condominium Act. Uncertain was the right of a

developer to include in the interim occupancy fee a charge for a phantom mortgage. The precise rate for interest to be paid on the purchaser's deposit was uncertain because of a dispute about the interpretation of the governing regulation. Final assessments for realty taxes had not been determined, and the defendant had launched assessment appeals. The defendant was unsure about whether it would be required to contribute to the condominium corporation's reserve funds. In resolving these uncertainties: the defendant included a charge for "phantom mortgages", it paid interest on deposits on residential units at the lower of the contending interest rates, it did not pay interest on deposits for parking and storage units (under the condominium declaration, these units were available only for those residing in the residential units and were owned by the owner of the residential units) and it made a contribution to the reserve fund. The defendant alleged that this "final closing package" was designed to close the transaction upon fair and equitable terms, balancing the interests of the purchaser and the developer. It contended that the final closing package conferred a benefit on the purchasers.

After the final closing and after it was determined in *Ackland v. Yonge-Esplanade Enterprises Ltd.* that developers must pay interest at the higher of the contending interest rates, in proceedings under the Class Proceedings Act, 1992, S.O. 1992, c. 6, the plaintiff sued on her own behalf and on behalf of some 544 purchasers of units. The class claimed \$617,031.75 for underpaid interest on the residential units, and it claimed \$881,996.97 for unpaid interest on deposits for parking and storage units. The class claimed further that the interest should be paid on a compound basis, which the defendant disputed. The defendant also disputed the claim for interest on deposits for parking and storage units and took the position by way of defence and counterclaim that it should be permitted to readjust the terms of the final closings because had it known of its obligation to pay interest at the higher rate, it would have been entitled to require the purchasers to close on less favourable terms. The defendant alleged that in the circumstances the purchasers had been unjustly enriched and that there should be an adjustment for the realty tax charge, an adjustment on account of the payment to the reserve fund, and also for some claimants an adjustment of the mortgage interest charge.

**Held**, there should be judgment for the plaintiff.

The defendant was required by s. 53 of the Act to pay interest on the deposits for parking and storage spaces during the interim occupancy period. Under this section, with certain exceptions, all money received from a purchaser on account of a sale "of a proposed unit for residential purposes" was to be held in trust in a separate account, and where a purchaser enters into possession before a deed is delivered, the declarant must pay interest at the prescribed rate. Subject to this obligation to pay interest at the prescribed rate, the declarant is entitled by s. 53(4) to any interest earned on the money held in trust. The Act did not define "residential unit" and the Act's only reference to parking and storage units was in s. 22(7), which provided that no owner is entitled to a vote in respect of a unit that is intended for parking or storage purposes. The plain and ordinary meaning of the phrase "residential purposes", the context of the statute as a whole, an analysis of the purpose and scheme of the whole Act, and case-law about the purpose of s. 53 all supported the conclusion that purchasers were entitled to interest on the deposits paid for and parking and storage units. As a matter of statutory interpretation, this interpretation was sufficiently certain; it is not necessary to test the interpretation against every conceivable factual setting and statutory interpretation is very much a case-by-case exercise. The defendant,

however, was not required to pay interest on deposits on a compound basis. Neither the Act nor the regulation could be read as imposing an obligation to pay compound interest. Moreover, the Act explicitly abrogated the ordinary duties of the trustee and entitled the developer to retain interest earned on deposits which exceeded the interest to be paid. In the face of these provisions, it was difficult to find a basis in law or in equity to impose a duty to pay interest on a compound basis.

The defendant was not entitled by the contract to readjust for municipal taxes, the amount paid to the reserve fund, or for mortgage interest. No provisions in the contract or in the closing documentation assisted the defendant. The notation "E. & O. E." (errors and omissions excepted) and the undertaking to readjust did not apply in circumstances where the defendant's own argument was that it deliberately developed a fair and equitable final closing package. The non-merger clause was not relevant to the issues at hand.

The principles of unjust enrichment also did not avail the defendant. An analysis of the facts showed that no benefit was conferred upon the members of the plaintiff class or detriment suffered by the defendant. If this was incorrect and there was a benefit conferred, there were clear juristic reasons which would entitle the plaintiff class to retain the benefit, namely, the closings of the contracts and the statutory entitlement of the plaintiff class to interest. It would be a startling result if a party, having assessed the risks and decided to complete a transaction on certain terms in light of those risks, could elect to reopen the transaction when one or more of the risks does not turn out as that party hoped. The law's general policy favouring security of transactions means that the courts will not grant restitutionary recovery where the parties have entered into a contract and that contract has not been held unenforceable or rescinded for a reason recognized by either law or equity.

### **Cases referred to**

Abdool v. Somerset Place Developments of Georgetown Ltd. (1992), 10 O.R. (3d) 120, 96 D.L.R. (4th) 449, 27 R.P.R. (2d) 157 sub nom. Budinsky v. Breakers East (C.A.); Ackland v. Yonge-Esplanade Enterprises Ltd. (1992), 10 O.R. (3d) 97, 95 D.L.R. (4th) 560, 27 R.P.R. (2d) 1 (C.A.); Albrecht v. Opemoco Inc. (1991), 5 O.R. (3d) 385, 85 D.L.R. (4th) 289, 21 R.P.R. (2d) 68 (C.A.); Berman v. Karleton Co. (1982), 37 O.R. (2d) 176, 28 C.P.C. 168, 24 R.P.R. 8 (H.C.J.); Brock v. Cole (1983), 40 O.R. (2d) 97, 142 D.L.R. (3d) 461, 31 C.P.C. 184, 13 E.T.R. 235 (C.A.); Carleton Condominium Corp. No. 11 v. Shenkman Corp. (1985), 49 O.R. (2d) 194, 14 D.L.R. (4th) 571, 35 R.P.R. 28 (H.C.J.); Ceolaro v. York Humber Ltd. (1994), 53 C.P.R. (3d) 276, 37 R.P.R. (2d) 1 (Ont. Gen. Div.); Claiborne Industries Ltd. v. National Bank of Canada (1989), 69 O.R. (2d) 65, 59 D.L.R. (4th) 533, 34 O.A.C. 241 (C.A.); Dunkelmann v. Neighbourhood Developments Ltd. (1985), 33 A.C.W.S. (2d) 288 (Ont. H.C.J.); Governor's Hill Developments Ltd. v. Robert (1993), 33 R.P.R. (2d) 67 (Ont. Gen. Div.); Grandby Investments Ltd. v. Wright (1981), 33 O.R. (2d) 341, 124 D.L.R. (3d) 313, 20 R.P.R. 30 (S.C.); Greenberg v. Meffert (1985), 50 O.R. (2d) 755, 18 D.L.R. (4th) 548, 7 C.C.E.L. 152, 37 R.P.R. 74 (C.A.); Handsaeme v. Dyck (1982), 20 Alta. L.R. (2d) 279, 26 R.P.R. 9 (Q.B.); Hashim v. Costain Ltd. (1986), 54 O.R. (2d) 790 (H.C.J.); Kiriri Cotton Co. v. Dewani, [1960] A.C. 192, [1960] 1 All E.R. 177, [1960] 2 W.L.R. 127, 104 Sol. Jo. 49 (P.C.); Lamb v. Costain Ltd. (1985), 49 O.R. (2d) 657, 40 R.P.R. 83 (H.C.J.); Lewis v. Westa Holdings Ltd. (1975), 8 O.R. (2d) 181 (Co. Ct.);

Pettkus v. Becker, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165; R. v. Budget Car Rentals (Toronto) Ltd. (1981), 31 O.R. (2d) 161, 121 D.L.R. (3d) 111, 57 C.C.C. (2d) 201, 20 C.R. (3d) 66, 9 M.V.R. 52, 15 M.P.L.R. 172 (C.A.); R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, 93 D.L.R. (4th) 36, 114 N.S.R. (2d) 91, 139 N.R. 241, 313 A.P.R. 91, 10 C.R.R. (2d) 34, 74 C.C.C. (3d) 289, 43 C.P.R. (3d) 1, 15 C.R. (4th) 1; Telford v. Holt, [1987] 2 S.C.R. 193, 41 D.L.R. (4th) 385, 54 Alta. L.R. (2d) 193, 78 N.R. 321, [1987] 6 W.W.R. 385, 37 B.L.R. 241, 21 C.P.C. (2d) 1, 46 R.P.R. 234; York Condominium Corp. No. 167 v. Newrey Holdings Ltd. (1981), 32 O.R. (2d) 458, 122 D.L.R. (3d) 280, 14 R.P.R. 62 (C.A.)

### **Statutes referred to**

Condominium Act, R.S.O. 1980, c. 84, ss. 22(7), 34, 51, 53(3), 54(4), 55, 61 -- now R.S.O. 1990, c. C.26  
Landlord and Tenant Act, R.S.O. 1990, c. L.7

### **Rules and regulations referred to**

R.R.O. 1980, Reg. 121 (Condominium Act), s. 33 -- now R.R.O. 1990, Reg. 96, s. 35

### **Authorities referred to**

Loeb, A., Condominium Law and Administration, 2nd ed. (Toronto: Carswell, 1989), pp. 5-22.3 to 5-22.4  
Maddaugh, P.D., and McCamus, J.D., The Law of Restitution (Aurora: Canada Law Book, 1990), p. 46  
Oxford English Dictionary, "residential"

PROCEEDINGS under the Class Proceedings Act, 1992, S.O. 1992, c. 6.

J. Gardner Hodder and Andrew Frei, for plaintiffs. Jonathan Fine and Jack Pappalardo, for defendant.

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**SHARPE J.:** —

### Introduction

This class action concerns the statutory right of purchasers of condominium units for residential purposes to be paid interest on their deposits during the interim occupancy period. The plaintiff sues on her own behalf and on behalf of some 544 purchasers of units in two condominiums, collectively known as "The Liberties", developed by the defendant Toronto College Park. Upon the plaintiff's motion for summary judgment, Winkler J. ordered that there be an expedited trial of the common issues he had earlier certified as appropriate for determination by way of class proceeding. The trial was significantly facilitated by virtue of an

agreed statement of facts. Only three witnesses were called, and there are few, if any, factual issues to be resolved.

## Background

The Liberties condominiums form part of a major development project undertaken by the defendant in the area bounded by Bay, College, Yonge and Gerrard Streets in downtown Toronto. The overall development is multi-purpose. The condominiums involved in this action are comprised of dwelling units, parking and storage units, certain units owned by the condominium corporation and designated for non-residential purposes (recreational and other similar uses) and the usual common elements.

The defendant was the vendor, declarant and proposed declarant (hereafter "developer") within the meaning of the Condominium Act, R.S.O. 1980, c. 84. The defendant began to market the units in 1986 and 1987 and required the purchasers to take interim occupancy during the spring of 1989. Interim occupancy continued for approximately 18 months until final closing in August and September 1990. In accordance both with the Condominium Act and the agreements of purchase and sale, the defendant charged the purchasers an interim occupancy fee comprised of an amount for mortgage interest the purchaser would have to pay on final closing in respect of a mortgage to be assumed, an amount reasonably estimated on a monthly basis for municipal taxes attributable to the unit and the projected common expense contribution for the unit.

The defendant was required by s. 53(3) of the Condominium Act to pay interest on the purchasers' deposits during the interim occupancy period. The Act requires that interest be paid at a rate prescribed by regulation. The regulation fixes the rate at one per cent below the rate paid on the Province of Ontario Savings Office ("P.O.S.O.") savings accounts. At the time of interim occupancy, there was uncertainty as to whether the Act required developers to pay interest on deposits at the "lower Trillium" rate or at the "higher Trillium" rate offered by P.O.S.O. The defendant paid interest at the "lower Trillium" rate on the deposits for the dwelling units and paid no interest at all on deposits for parking and storage units.

It is conceded by the defendant that by virtue of the decision of the Court of Appeal in *Ackland v. Yonge-Esplanade Enterprises Ltd.* (1992), 10 O.R. (3d) 97, 95 D.L.R. (4th) 560, it ought to have paid purchasers at the higher Trillium rate on their deposits for dwelling units. The amount owing to the plaintiff class on this account is \$617,031.75. The plaintiff contends that the defendant was required by statute to also pay interest on the deposits for parking and storage units. It is agreed that if the plaintiff class succeeds on this point, the amount owing on account of parking and storage unit interest is \$881,996.97. The plaintiff further argues that all interest should have been paid on a compound basis.

The defendant disputes the entitlement of purchasers of parking and storage units to be paid any interest on their deposits, and also disputes the plaintiffs' contention that the interest on deposits should be compounded. Moreover, the defendant takes the position that in light of the plaintiffs' claim for interest under the statute, it should be permitted to revisit the terms upon which the final closings were accomplished on the ground that had it known of the obligation to pay interest at the higher Trillium rate, it would have been entitled to require the purchasers to

close on less favourable terms. In particular, the defendant asserts the right to readjust the amounts charged during interim occupancy for taxes and as well, to a credit in its favour on account of payments made following closing to the condominium corporation's reserve funds. There is also a claim to readjust for the amount of mortgage interest charged some members of the plaintiff class.

## Issues

1. Is the defendant required by s. 53 of the Condominium Act to pay interest on the deposits for parking and storage spaces during the interim occupancy period?
2. Is the defendant required to pay interest on deposits on a compound basis?
3. Is the defendant entitled by contract or under the law of unjust enrichment to revisit the adjustments on final closing with respect to:
  - (a) municipal taxes?
  - (b) the amounts paid to the condominium corporations' respective reserve funds?
  - (c) mortgage interest?

## Findings and Analysis

1. Is the Defendant Required to Pay Interest on Deposits for Parking and Storage Units?

The relevant statutory provision is s. 53 which provides as follows:

53(1) All money received by or on behalf of a proposed declarant from a purchaser on account of a sale or an agreement for the purchase and sale of a proposed unit for residential purposes before the registration of the declaration and description, other than money paid as rent or as an occupancy charge, shall, notwithstanding the registration of the declaration and description thereafter, be held in trust by the person receiving such money for the person entitled thereto in respect of the agreement and such money shall be held in a separate account designated as a trust account at a chartered bank or trust company or a loan company or credit union authorized by law to receive money on deposit or a Province of Ontario Savings Office until,

- (a) its disposition to the person entitled thereto, or
- (b) delivery of prescribed security to the purchaser for repayment.

(2) Where an agreement of purchase and sale referred to in subsection (1) is terminated and the purchaser is entitled to the return of any money paid under the agreement, the proposed declarant shall pay to the purchaser interest on such money at the prescribed rate.

(3) Subject to subsection (2), where a purchaser of a proposed unit under an agreement of purchase and sale referred to in subsection (1) enters into possession or occupation of the unit before a deed or transfer of the unit acceptable for

registration is delivered to him, the proposed declarant shall pay interest at the prescribed rate on all money received by him on account of the purchase price from the day the purchaser enters into possession or occupation until the day a deed or transfer acceptable for registration is delivered to him.

(4) Subject to subsections (2) and (3), the proposed declarant is entitled to any interest earned on the money required to be held in trust under subsection (1).

The Act does not define "residential unit" but the phrase also appears throughout ss. 51 to 55, the part of the Act which stipulates the terms upon which condominium units may be sold and leased by developers.

The only reference in the Act to parking and storage units is the following:

22(7) No owner is entitled to a vote in respect of a unit that is intended for parking or storage purposes.

The facts with respect to the parking and storage units purchased by members of the plaintiff class are as follows. Under the terms of the declarations, parking and storage units could be purchased only by purchasers of dwelling units at The Liberties. The parking units are in the underground garage and the storage units are contained within each building but physically separate from the dwelling units. A City of Toronto by-law requires the provision of specified minimum parking facilities for such buildings. The number of dwelling units exceeded the number of parking and storage units. The defendant required purchasers of dwelling units to enter separate agreements of purchase and sale for the parking and storage units. These were entered at a later time, after all the dwelling units had been sold. However, purchasers took title to their dwelling and parking and storage units in one single deed or transfer. Purchasers of dwelling units were required to pay a deposit of 25 per cent of the purchase price, while purchasers of parking and storage units were required to pay a deposit of 100 per cent of the purchase price of those units prior to interim closing.

Ownership and use of parking and storage units is strictly limited to those who reside in the dwelling units. The declarations of the two condominium corporations clearly provide that only owners of dwelling units may own parking and storage units, and further provide that no one may even use a parking unit who does not reside at the Liberties:

#### 4.02 Ownership and Use of Parking Units

- (a) No Parking Unit may be transferred to, or owned by, any person, other than the Declarant, who is not, or does not concurrently with the delivery of such transfer become, a registered Owner of a Dwelling Unit or of a dwelling unit in Phase b and no Parking Units shall be leased to, or used by, any person who does not reside in a Dwelling unit or a dwelling unit in Phase B. Furthermore, no Parking Unit shall be transferred or leased to, or used by, any person who is not a registered owner of a Dwelling Unit unless and until such person has:
  - (i) delivered to the Corporation an agreement, in a form prescribed by the

Corporation, covenanting that such person, and any others permitted by such person to use such Unit, shall comply with the act the Declaration, the By-laws, the Rules and Reciprocal Agreements, including the provisions of this section; and

(ii) provided the Corporation with his name and full address.

(Emphasis added)

A similar provision applies with respect to storage units.

In argument, Mr. Fine contended that the concluding sentence of s. 4.02(a), commencing with "Furthermore" permitted owners of parking units to transfer them to persons who do not reside in the condominium. In my view, the language of the document simply will not bear that interpretation. It is clear from the underlined words which precede that sentence that parking units cannot be leased or transferred to anyone who does not reside in The Liberties. The sentence following relied upon by Mr. Fine deals with transfers to non-owner residents, but does not permit lease or transfer to a non-resident.

In light of these facts, are the agreements of purchase and sale for parking and storage units entered into by members of the plaintiff class agreements "for the purchase and sale of a proposed unit for residential purposes" within the meaning of s. 53(1)?

I turn first to the plain and ordinary meaning of the phrase "residential purpose". Those words, in my view, are clearly capable of embracing units for parking and storage in condominiums such as those involved in this case. The Oxford English Dictionary definition of "residential" includes the following: "connected with, pertaining or relating to, a residence or residences (in a general or specific sense)". Spaces to park a car and store items in close proximity to the place of other domestic functions and activities are common elements of a residence. Residences, including apartment-type residences in multiple-dwelling buildings, almost always provide space for parking and storage. The exigencies of modern life require that parking and storage facilities be made available to be used in connection with one's dwelling. Parking and storage units may, accordingly, be regarded as incidental or ancillary aspects or elements of a residence and, accordingly, in my view, may be said to fall within the ordinary meaning of the phrase "used for residential purposes" in the present context.

While clearly not dispositive of the issue before me, it is significant that with reference to another legislative scheme designed to protect consumers, the Landlord and Tenant Act, R.S.O. 1990, c. L.7, the phrase "used for residential purposes" has been interpreted to include a parking space rented by the tenant of an apartment complex. In *Lewis v. Westa Holdings Ltd.* (1975), 8 O.R. (2d) 181 (Co. Ct.) at p. 187, Judge Dymond dealt with the case of a tenant injured while using her parking space:

The parking space was as much a part of the residential premises as would be a garage attached to a private home, or an allocated trunk space in the basement of an apartment building, or even perhaps a milk-box in the wall of an apartment building. It was an adjunct of the residence itself, exclusive to the tenant and used

by her for "residential purposes", that is, in connection with her normal living and not for business purposes.

I adopt Judge Dymond's treatment of the relationship between a parking space and a residence.

I turn from the plain and ordinary meaning of the words of s. 53 to the context of the statute as a whole. Is there anything in the Act itself which indicates that the deposits for parking and storage units should be either included or excluded from the protective reach of s. 53?

The defendant relies upon certain other provisions of the Act in support of its argument that no interest was payable on the deposits for parking and storage units. As already noted, the Act does not define "residential" or "residential purpose". Parking and storage units are not defined either, and they are specifically mentioned only in s. 22(7), *supra*, in relation to voting rights. It is argued that this provision in effect creates a category of condominium unit distinct from residential units and that this category must be maintained consistently throughout the Act, thereby precluding an interpretation of "unit for residential purposes" which includes parking and storage units. In my view, this argument reads far more into s. 22(7) than is warranted. Looking at the Act as a whole, it is apparent that the legislature chose not to create a scheme dependent upon rigid definitional categories. Rather, one finds an Act which establishes legislative distinctions appropriate to the particular issue at hand. In my view, s. 22(7) adopts the category "unit intended for parking or storage purposes" in relation to voting rights and nothing more.

It is, of course, imperative that the Act be interpreted as a consistent and coherent whole, but that does not mean that because one category of unit is distinguished from all others with respect to one issue, that category must forever remain a distinct category for all issues. Indeed, given the manner in which the Act deals with the myriad issues of condominium law, such an approach could lead to serious distortions. Accordingly, I reject the contention that the provision denying voting rights to owners of parking units means that agreements of purchase and sale for such units may not fall within s. 53 with respect to the developer's obligation to pay interest.

A similar argument advanced by the defendant relies on s. 34 dealing with the requirements imposed upon condominium corporations with respect to audits. Section 34(11) provides that the section "does not apply where the property consists of less than twenty-five units for residential purposes". It was submitted that if agreements for the purchase of parking and storage units were held to fall within s. 53, then parking and storage units would have to be distinct "units for residential purposes" and counted as such for the purposes of this provision with the result that audits would be required in situations not intended by the legislature. The need to interpret the Act in a coherent and consistent manner does not preclude interpreting a phrase which appears in various parts of the statute in a manner which accords with the context and purpose of the provision being interpreted. In my view, it is clearly possible, given the context and purpose of these provisions, to hold that "unit for residential purposes" in s. 53 includes parking and storage units purchased in connection with a dwelling unit, but at the same time hold that a parking and storage unit should not be separately counted as a distinct unit "for residential purposes" when determining the number of units required to invoke the audit requirements of s. 34.

I turn next to the purpose of the Act as a whole and of s. 53 in particular. In my view, this consideration strongly supports the interpretation advanced by the plaintiff class. The

Condominium Act provides a comprehensive scheme designed to protect consumers of condominium units. The Act recognizes an imbalance of bargaining power and seeks to redress that imbalance in favour of consumers: *Ceolaro v. York Humber Ltd.* (1994), 37 R.P.R. (2d) 1 at p. 73, 53 C.P.R. (3d) 276 (Ont. Gen. Div.), per Winkler J. The appropriate approach to interpreting the Condominium Act was described as follows by Krever J. in *Carleton Condominium Corp. No. 11 v. Shenkman Corp.* (1985), 49 O.R. (2d) 194 at p. 209, 14 D.L.R. (4th) 571 (H.C.J.):

The Condominium Act was, without question, remedial legislation. . . . As remedial legislation one is obliged to give it such a large and liberal interpretation as will best attain the object of the Act according to its true intent, meaning and spirit: see s. 10 of the Interpretation Act.

The protective purpose of the Act with respect to purchasers was emphasized by the Court of Appeal in *York Condominium Corp. No. 167 v. Newrey Holdings Ltd.* (1981), 32 O.R. (2d) 458, 122 D.L.R. (3d) 280.

This does not, of course, mean that the Act must always be interpreted in favour of the consumer. With reference to the interim occupancy fee provisions, the Court of Appeal held in *Albrecht v. Opemoco Inc.* (1991), 5 O.R. (3d) 385 at p. 393, 85 D.L.R. (4th) 289, that the Act "strikes a balance between developers and purchasers". Similarly, with reference to the disclosure provisions of s. 52, Robins J.A. stated in *Abdool v. Somerset Place Developments of Georgetown Ltd.* (1992), 10 O.R. (3d) 120 at p. 145, 96 D.L.R. (4th) 449 (C.A.), that the provision should be interpreted "in a manner that properly balances consumer protection and the commercial realities of the condominium industry".

The specific purpose of s. 53 has been the subject of judicial comment. It forms an important element of the consumer protection package and over the years has been tightened to deal with the increasingly sophisticated stratagems devised to circumvent the Act's legislative purpose: *Grandby Investments Ltd. v. Wright* (1981), 33 O.R. (2d) 341, 124 D.L.R. (3d) 313 (S.C.); *Dunkelman v. Neighbourhood Developments Ltd.* (1985), 33 A.C.W.S. (2d) 288 (Ont. H.C.J.); *Berman v. Karleton Co.* (1982), 37 O.R. (2d) 176, 28 C.P.C. 168 (H.C.J.); *Lamb v. Costain* (1985), 49 O.R. (2d) 657, 40 R.P.R. 83 (H.C.J.); *Hashim v. Costain Ltd.* (1986), 54 O.R. (2d) 790 (H.C.J.).

The obligation to pay interest on deposits during the interim occupancy period imposed by s. 53 is an exception to the usual situation where the vendor of real estate is not required to pay interest on the purchaser's deposit. The *Ackland* case, *supra*, holds that this exception was created by the legislature to protect condominium purchasers from developers delaying final closing and financing the project with the deposits. The obligation to pay interest on the deposit creates an incentive to bring the project to completion with minimal delay.

In light of these general and specific statutory purposes, the case for finding that deposits on parking and storage units are caught by s. 53 in the situation of *The Liberties* development is strong. It is difficult to see why a consumer should receive the protection of the Act when buying a dwelling unit but not a parking and storage space to be used in connection with the dwelling. It

would be surprising if the legislature intended to deny the legislative protection just described with respect to purchases of parking and storage units in the factual setting presented by this case.

In argument, counsel for the defendant conceded that it followed from his submission that no interest is payable on parking and storage units that a developer could, in the case of a single agreement for a dwelling and parking unit, allocate a disproportionate portion of the deposit to the parking unit and thereby reduce the extent of its obligation to pay interest. In my view, an interpretation that would produce such a result is plainly unacceptable. It would open an obvious loop-hole in the statute's protective provisions. At best, such an interpretation is suggestive of a technical and narrow approach often associated with taxing legislation which is completely inconsistent with the legislative purpose just described.

The defendant placed particular emphasis on what I will label the uncertainty argument. It was submitted that the only acceptable definition of the phrase "unit for residential purposes" is one that on its face provides developers with an immediate and obvious answer to whether or not a deposit falls within s. 53. In the defendant's submission, the phenomenon of mixed use condominium developments means that the only interpretation up to this task is one that simply and cleanly excludes agreements for the purchase and sale of parking units from consideration. How could a developer know, counsel asked, how to deal with a deposit on a parking unit in a development which included both residential and commercial units? What if a purchaser bought both a dwelling and commercial unit together with a parking unit. How would the developer decide whether to treat the deposit as falling under the protection of s. 53? This situation should, counsel submitted, be regarded as the "litmus" test for any interpretation -- if it does not provide a clear answer, the interpretation must be rejected. This argument was bolstered by reference to the other consumer protection provisions applicable to sales of units for residential purposes found in ss. 51-55, and in particular to s. 55 which makes it an offence to knowingly contravene s. 53(1), requiring the developer to hold deposits on units for residential purposes in trust.

In my view, this argument is lacking in substance. In the first place, it exaggerates the degree of uncertainty that is encountered if deposits for certain parking units are protected by s. 53. In the vast majority of cases, it would be readily straightforward for a developer to determine whether a parking unit was being purchased in conjunction with a dwelling unit. Secondly, the defendant's argument aspires to an unrealistic if not impossible degree of certainty. One can certainly imagine situations where it might be difficult to determine the purpose for which the parking unit was being purchased and the defendant's "litmus test" scenario is one example. However, for virtually every statute on the books, it is possible to concoct such troublesome hypotheticals. Uncertainties like this represent run-of-the-mill interpretive questions routinely encountered with statutes of this kind. The suggestion that no interpretation should be accepted that cannot provide an immediate and obvious answer to all such hypotheticals would set an impossible and unworkable standard of clarity in legislative drafting and interpretation. It is plainly not the case that a court is precluded from adopting an interpretation of a statute unless it can confidently predict how that definition will operate in every other conceivable factual setting. Statutory interpretation is very much a case-by-case exercise. While the court must carefully consider the overall legislative scheme with a view to interpreting any particular provision in a coherent and sensible manner, it will frequently be the case that further

interpretation and refinements will be required in subsequent cases with reference to different facts.

The Supreme Court of Canada has held that certainty in statutory interpretation can only be achieved in relation to an instant case: *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at pp. 638-39, 93 D.L.R. (4th) 36 at pp. 56-57, per Gonthier J.:

Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.

By setting out the boundaries of permissible and non-permissible conduct, these norms give rise to legal debate. They bear substance, and they allow for a discussion as to their actualization. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens.

Indeed, no higher requirement as to certainty can be imposed on law in our modern state. Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective.

The fact that penal consequences may follow should a developer fail to observe the trust provisions does not alter my view as to the manner in which the statute should be interpreted. As the Court of Appeal stated in *R. v. Budget Car Rentals (Toronto) Ltd.* (1981), 31 O.R. (2d) 161 at p. 167, 121 D.L.R. (3d) 111 at p. 117, per Howland C.J.O.:

Among these principles is the often-quoted principle that a penal statute must be construed "strictly". That this is so is surely beyond dispute, but it is important that it should be clear what the principle really means, and what it does not mean. What it does mean is that where a person is charged with an offence created by a statute, the conduct of that person which gives rise to the charge, or the conduct of someone for which that person may be held answerable, must be such as can be clearly and unmistakably demonstrated to fall within the kind of conduct which is proscribed by the statute. What the principle does not mean is that because a statute is "penal" or contains provisions to which penal consequences for breaches are attached, the meaning that is to be given to language used in the statute is to be determined in accordance with a rule of construction that is somehow "stricter" than, or is to be applied more stringently than, the ordinary rules which apply to determine the

meaning to be given to language used in statutes.

I hardly need add that if the developer wants to be certain of complying with the law in situations which appear close to the line, there is an easy solution: pay the purchaser interest on the deposit. An interpretation that might cause developers to err on the side of caution in a relatively small number of situations where the import of the statute is not clear is a small price to pay for an interpretation which so clearly accords with the overall purpose of the statute in the vast majority of cases.

For these reasons, I find that the defendant was required by s. 53(3) to pay members of the plaintiff class interest on deposits for parking and storage units during the interim occupancy period and that there is owing to the plaintiff class \$881,996.97 on that account.

## 2. Is the Defendant Required to pay Interest on a Compound Basis?

The plaintiff class submits that the defendant is required to pay interest on the deposits on a compound basis. First, it is submitted that interest during the interim occupancy period should be compounded, and second, it is submitted that "equitable interest" should be paid on interest outstanding from the date of final closing to payment.

Section 53, supra, does not explicitly require the developer to pay compound interest. R.R.O. 1980, Reg. 121, s. 33, stipulates the rate of interest, and provides as follows:

33. The rate of interest under subsections 53(2) and (3) of the Act on money held in trust under subsection 53(1) of the Act shall,

- (a) for the six months immediately following the last day of March of each year, be 1 per cent per annum below the rate paid on The Province of Ontario Savings Office savings accounts on the 1st day of April of that year; and
- (b) for the six months immediately following the last day of September of each year, be 1 per cent per annum below the rate paid on The Province of Ontario Savings Office savings accounts on the 1st day of October of that year.

It is argued by the plaintiff class that since s. 53(3) requires the developer to hold the deposits on trust, interest should be calculated on a compound basis to preclude the trustee from profiting at the expense of its beneficiaries. The developer will be able to invest the deposits to obtain compound interest and as trustee should pass that benefit on.

In my view, neither the Act nor the regulation can be read as imposing an obligation to pay compound interest. The Regulation imposes very detailed requirements with respect to the calculation of interest and fails to stipulate compounding. Moreover, the Act explicitly abrogates the ordinary duties of the trustee with respect to the use of the deposits. Developers are permitted to use the deposits and are required to pay interest at 1 per cent lower than the rate stipulated. The legislature has imposed a trust, but relieved the trustee of some of the usual obligations with respect to use of the trust funds. The Act also contains a specific provision dealing with the right

of the developer to retain interest earned on deposits which exceeds the amount of interest prescribed by the regulations: s. 54(4).

In the face of these specific provisions, it is difficult to find a basis in law to impose a duty to pay interest on a compound basis. Moreover, it appears to be widely accepted in practice that interest is to be calculated on a simple interest basis. A leading text, A. Loeb, *Condominium Law and Administration*, 2nd ed. (Toronto: Carswell, 1989), pp. 5-22.3 to 5-22.4, indicates that interest is to be calculated as simple interest, and the evidence in this case indicates this to be the industry practice. It is also worth noting that although there have been several reported cases dealing with the obligation to pay interest, the point of compound interest does not seem to have been even argued in any of these cases. For these reasons I find that the defendant was not in breach of its statutory obligations in failing to pay compound interest and I reject the plaintiff's claim in that regard.

I also reject the claim of the plaintiff class to equitable interest on the amount owing. Having dismissed the contention that there is an entitlement to compound interest while the money is subject to the statutory trust, it is difficult to see why compound interest should be required thereafter. Moreover, in my view, the conduct of the defendant is not comparable to that found in the cases relied upon by the plaintiff class. In *Brock v. Cole* (1983), 40 O.R. (2d) 97, 13 E.T.R. 235 (C.A.), a solicitor was found to have committed an obvious breach of trust and to have wrongfully withheld payment thereafter. Equitable interest was also awarded in *Claiborne Industries Ltd. v. National Bank of Canada* (1989), 69 O.R. (2d) 65, 59 D.L.R. (4th) 533 (C.A.), but there the court found a fraudulent conspiracy justifying an award of exemplary damages. The conduct of the defendant in the case at bar is not in the same category. While I have found in favour of the plaintiff class, it is my view that circumstances are more akin to a commercial claim for which the usual prejudgment interest rules are appropriate.

### 3. Is the Defendant Entitled by Contract or under the Law of Unjust Enrichment to Revisit the Adjustments on Final Closing?

The defendant asserts by way of defence and counterclaim that it is entitled to reopen the adjustments made on final closing in view of the claims asserted by the plaintiff class for interest. The defendant does not now advance these claims with a view to compelling members of the plaintiff class to make payments to it, but only to the extent necessary to reduce or eliminate the interest claim.

It is the position of the defendant that the terms of the final closings were more favourable to the plaintiff class than strictly required by the agreements of purchase and sale. The defendant submits that in closing the transactions on these allegedly favourable terms, it conferred a benefit upon the members of the plaintiff class that they should not be permitted to retain in addition to the interest claim. It is the defendant's position that it has, in effect, already given the plaintiff class the benefit of favourable closing terms and that if the members of the plaintiff class were now to receive further interest payments, they would be getting a "windfall". The defendant relies upon the adjustment on closing for real property taxes, payments it made to the condominium corporations' reserve funds following closing and the calculation of the mortgage interest component of the interim occupancy fee with respect to 25 purchasers.

I will consider the specifics of each of these items below, but turn first to the general question of whether the defendant has the right at this stage to reopen the terms upon which these transactions were closed.

Mr. Ian Galloway, president of the defendant and Mr. Martin Cukierman both gave evidence as to the circumstances of the final closings and the terms of the final closing package which supplemented the facts agreed to. At the time of final closing, the defendant faced a number of uncertainties. First and perhaps most serious was the "phantom mortgage" issue. Until the decision of the Court of Appeal in *Albrecht*, supra, the right of the developer to levy as part of the interim occupancy fee a charge for interest, where the purchaser was not entering a vendor take-back mortgage was uncertain. The interest component of the interim occupancy fee represented a significant amount for The Liberties development, approximately \$11 million. The second uncertainty was the question of whether interest had to be paid at the higher or lower Trillium rates. At the time of final closing there were no judicial decisions on this point. There were a number of decisions in the period from May 1991 to January 1992. The Court of Appeal rendered its decision in *Ackland*, supra, in October 1992 and the matter was not finally resolved until the Supreme Court of Canada refused leave to appeal from the decision of the Court of Appeal in May 1993. The third item of uncertainty was the matter of realty taxes. At the time of final closing, final assessments of the units for realty taxes had not been determined. As will be indicated, assessment appeals launched by the defendant were pending and accordingly the defendant did not know for certain the amount of its liability to taxes for the interim occupancy period. A fourth uncertainty identified by Mr. Galloway was the question of the condominium corporation's reserve funds and whether, in light of the extended interim occupancy period, the defendant would be required to contribute to those funds. Another uncertainty in the period leading up to final closing was the question of how long it would be before the defendant would be in a position to accomplish final closing. This was obviously known to the defendant by the time of the closings, but getting the closings done was clearly a matter of significant concern to the defendant. It was clearly in the defendant's interest to bring about the closings as smoothly as possible.

It is the defendant's position that in the face of these uncertainties, it developed a final closing package designed to close the transactions upon fair and equitable terms, balancing the interests of the purchasers and the developer. The defendant says that it attempted to complete the transactions in a manner that would put the purchasers in the same position they would have been in had interim and final closing been simultaneous. This is the principle identified by the judgment of the Court of Appeal in *Albrecht*, supra, over a year after the closings at issue here.

I will consider below the validity of the defendant's contention that the final closing package conferred a benefit upon the purchasers. Assuming for present purposes that the defendant is able to establish that a benefit was conferred, does the defendant have the right to reopen those transactions and readjust the terms of closing in view of the statutory claim for interest now advanced by the plaintiff class?

(a) Contract

The very purpose of a closing is to bring closure on a transaction and achieve finality in the legal relations between the parties. Contractual provisions and undertakings on closings may preclude finality from prevailing where a mistake has been made. It is, however, important to note that this is not a case of mistake nor is it a situation where circumstances unknown to the defendant at the time of the final closing have taken them by surprise. It is clear that the defendants carefully calculated the various risks and uncertainties, and decided to extend certain terms to the purchasers to bring about the final closing of a large number of transactions in a relatively short space of time. Included in the various risks considered by the defendant was the matter of how much interest was owed to the members of the plaintiff class (although it would appear that the defendant did not take very seriously the risk that it might have to pay interest on the parking and storage deposits).

In asserting the right to reopen the closings, the defendant relies on contractual provisions, namely, the notation "E. & O. E." (errors and omissions excepted), the exchange of undertakings to readjust and the non-merger provision contained in the agreement of purchase and sale. The undertaking to re-adjust was in the following terms:

1. to readjust any item or items on the statement of adjustments if necessary forthwith upon demand including the payment of our proportionate share of any supplementary realty tax bills.
2. notwithstanding transfer of title to the unit, all my acknowledgements contained in the Agreement of Purchase and Sale shall remain in full force and effect and my obligations thereunder to be performed hereafter shall remain in full force and effect.

The non-merger provision of the agreement of purchase and sale is as follows:

Non-Merger -- All the acknowledgements of the Purchaser and the respective obligations of the Purchaser or the Vendor to be performed after either the Occupancy Date or the Closing Date shall remain in full force and effect notwithstanding the delivery of possession of the Unit or the transfer of title to the Unit, as the case may be.

In my view, none of these apply to the circumstances of the present case. The E. & O. E. notation by its very terms applies to errors or miscalculations. Similarly, the undertaking to adjust applies to errors made in determining the amounts owing upon final closing or where there is a specific agreement to re-adjust upon obtaining information not yet known: *Governor's Hill Developments Ltd. v. Robert* (1993), 33 R.P.R. (2d) 67 (Ont. Gen Div.); *Handsaeme v. Dyck* (1982), 26 R.P.R. 9, 20 Alta. L.R. (2d) 279 (Q.B.). In my view, it is clear that there was no error or miscalculation to which either the undertakings to readjust or the "E. & O. E." notation could apply. It is a central element of the defendant's argument that it deliberately developed a fair and equitable final closing package which benefited the purchasers. In light of that submission, it is not open to the defendant to now say that there is an error to correct.

I fail to see what relevance the non-merger clause has to the issues at hand. Moreover, the claim of the plaintiff class is based on statute, not contract (a point reinforced by the defendant's successful objection at trial to any consideration being given to an alternative contractual

argument to interest advanced by the plaintiff class). The argument of the defendant is, in effect, that a contractual provision permits it to avoid or reduce the obligations owed by statute to the members of the plaintiff class. Any contractual claim by the defendant to deprive the plaintiff class of the benefits of the Act is precluded by s. 61: "This Act applies notwithstanding any agreement to the contrary."

Accordingly, I find that the alleged benefits conferred upon the members of the plaintiff class were deliberately calculated in view of a variety of uncertainties, including that of the amount of interest payable on deposits, and that there is no contractual basis upon which the terms of final closing can be revisited.

#### (b) Unjust Enrichment and Equitable Set-off

Equity permits a party to reduce or eliminate the claim of another by way of set-off where some equitable ground can be shown for being protected against the adversary's demands: *Telford v. Holt*, [1987] 2 S.C.R. 193, 41 D.L.R. (4th) 385. In order to establish a claim for unjust enrichment a party must establish that a benefit has been conferred, a corresponding deprivation on the part of the party asserting the claim and the absence of any juristic reason, such as a contract or disposition of law, which entitles the other party to retain the benefit: *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257.

##### 1. Was a benefit conferred upon the members of the plaintiff class?

It is necessary to consider each of the alleged benefits in turn. However, it should be noted at the outset that while the defendant claims it attempted to resolve these uncertainties in a fair and equitable manner as between itself and the purchasers, in fact the various uncertainties were resolved largely in the defendant's favour. It was assumed that the \$11 million phantom mortgage interest issue would be resolved in the defendant's favour; the defendant paid the lower rate of interest on deposits thereby saving just over \$600,000 (excluding the interest with respect to the parking and storage deposits); the tax issue was resolved by the flow-through approach which ensured that the defendant would be fully reimbursed for taxes. Only with respect to the reserve fund issue, a matter of approximately \$270,000, did the defendant pay out money it might not in the end have to pay and there, the money was paid not to the purchasers but the condominium corporations.

#### (i) Municipal Taxes

The defendants claim to have conferred a substantial benefit upon the plaintiff class with respect to the manner in which taxes were dealt with in the final closing package. As already indicated, the defendant was entitled by the Act and by the agreements of purchase and sale to levy a charge for taxes as part of the interim occupancy fee. However, the actual amount of taxes for which the defendant would be liable to the city for the period of interim occupancy was uncertain at the time of interim occupancy. Section 53(6) of the Act limits the municipal tax component of the interim occupancy fee to "an amount reasonably estimated on a monthly basis for municipal taxes attributable to the proposed unit". At the commencement of interim occupancy, the defendant adopted what appears to have been a wide-spread practice of

developers and estimated taxes at 1.5 per cent of the purchase price. Apparently through inadvertence, no amount was charged with respect to taxes attributable to the parking and storage units.

The defendant knew well before final closing that the 1.5 per cent estimate of taxes was high. It received supplemental property tax assessments for 1989 in December 1989 and assessments for 1990 in January 1990 which showed that the actual taxes would be lower than the 1.5 per cent estimate. Moreover, the defendant retained a tax consultant who advised prior to final closing that the assessments themselves "were approximately 20 per cent over and above what they should have been" (Defendant's Written Submission, para. 190). Appeals against the assessments were launched in January and March 1990.

To its credit, the defendant did not assert the right to adjust for taxes on the basis of the 1.5 per cent estimate but decided to adopt a "flow-through" approach. This was accomplished by claiming against the purchasers the taxes the defendant had actually paid, and permitting the purchasers to carry on the assessment appeals as owners. If a purchaser decided to continue the appeal and the appeal was successful, the purchaser would reap the benefit.

It is agreed that the defendant has fully recovered every cent it paid during the interim occupancy period for realty taxes. The defendant contends, however, it was legally entitled to estimate the taxes as of final closing in accordance with the industry standard of 1.5 per cent of the purchase price. Having closed on the "flow-through" basis, the defendant argues that it conferred a benefit upon the plaintiff class for the difference, namely, \$495,435.86. It should be noted that this amount includes an item of \$108,159.06, the amount the defendant claims those purchasers who elected not to continue the appeals would have recovered had they done so.

In my view, the defendant's argument on this point is completely lacking in substance. First, while the final amount of the taxes remained uncertain by the date of final closing, in light of the assessments, the appeals against those assessments and the advice the defendant received from the tax consultant, the defendant clearly could not have believed that the estimate of 1.5 per cent was still a reasonable one. On the basis of what the defendant knew at the time of closing, it is my view that it would not have been justified in asserting 1.5 per cent of the purchase price as "an amount reasonably estimated" for municipal taxes. The agreement of purchase and sale explicitly provides that the occupancy fee "may be revised by the Vendor either retroactively or prospectively, or both, from time to time based on revised estimates of the items which may be lawfully taken into account in the calculation thereof". Contractual discretion of this kind must be exercised in accordance with objective standards, honesty and good faith: *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 at p. 761, 18 D.L.R. (4th) 548 (C.A.), per Robins J.A.

Second, even if I am in error in finding that at the time of final closing the defendant could not have adjusted for taxes on the basis of the 1.5 per cent estimate, I find that the statutory and contractual right to act on the basis of a reasonable estimate of taxes has no application now that the amount of the taxes are actually known. The defendant asserts the right to readjust for taxes in light of what it now knows about the plaintiff's right to interest, but asks the court to permit it to ignore what it now knows about taxes. If the defendant were now permitted to claim almost half a million dollars more for taxes than it spent, then in my view, rather than avoiding an unjust

enrichment in favour of the plaintiff class, the court would be creating one in favour of the defendant.

Third, it is clear that no benefit has been conferred upon the plaintiff class and no detriment has been suffered by the defendant. The defendant, as it was entitled, was fully reimbursed for taxes during the interim occupancy period. The defendant's argument really amounts to this: we now know that we owe the purchasers interest because of the Act and the manner in which it has been interpreted by the courts. Had we known that at the time, in order to reduce our liability under the statute, we likely could have got away with over-estimating the taxes and we should be permitted to do so now. This is plainly not an argument a court should accept.

For all of these reasons, I find that there has been no benefit conferred by the defendant upon the plaintiff class which is capable of being the subject of an unjust enrichment or equitable set-off claim.

#### (ii) Reserve Fund Contributions

Following final closing, the defendant made contributions to both Condominium Corporation's reserve funds in the amounts of \$216,520 and \$94,054 respectively (a total of \$310,574) whereas the "expected and required amount in the reserve fund at turnover meeting" was \$28,000 and \$12,625 respectively. The extra contributions (in total \$269,949) were made in view of the lengthy interim occupancy period. It is the position of the defendant that it was not legally required to make these contributions, although it thought that a claim might be made and it decided to make the payments so as to be seen by any court to have acted fairly and to remain faithful to the principle it adopted with respect to the final closings, namely, that the parties should be put in the same position they would have been in had interim and final closings been simultaneous. Had that occurred, the purchasers would have been required to contribute to the reserve funds, and the amounts contributed by the defendant were calculated on that basis.

In my view, the defendant has failed to establish any basis for asserting a counterclaim or set-off with respect to these funds.

The first and most obvious point is that the money was paid to the condominium corporations, not to the members of the plaintiff class. The condominium corporations are separate legal entities with a legal personality and interests distinct from that of the purchasers. The reserve fund contributions were not dealt with on final closing. Moreover, the Act provides that all agreements of purchase and sale of units for residential purposes shall be deemed to contain "a provision that the vendor will not collect from the purchaser any money on behalf of the corporation": s. 51(1)(d). Allowing the defendant to set off its contributions to the reserve funds would permit it to do indirectly what the law does not permit it to do directly.

Second, if one considers the claim in terms of unjust enrichment, the extent to which an enhancement of the reserve fund enriched the purchasers is questionable. The condominium corporations are precluded by statute from distributing the reserve fund to owners prior to dissolution of the condominium: s. 36. Already, 40 per cent of the original purchasers have sold their units. It may be theoretically possible for the vendor of a condominium unit to claim an

adjustment on account of the reserve fund, but the defendant's own evidence is to the effect that this is not the usual practice and the Toronto Real Estate Board standard form agreement for condominium units contains a provision excluding such an adjustment. Hence, the likelihood of any purchaser benefiting directly is remote. While it was in the purchaser's interest to have the reserve fund enhanced so as to be available for future contingencies, it is difficult to see how a benefit of that kind could be measured for purposes of an unjust enrichment claim.

Third, it is clear that the defendant made a conscious decision in light of its perception of the legal requirements and the potential for claims it might face to pay money to the condominium corporations after the closing. That decision was taken on the basis of what the defendant then perceived to be in its best interest vis-à-vis the condominium corporations and without discussion with the members of the plaintiff class as to their rights and liabilities.

In these circumstances, in my view, it would be plainly inequitable and unjust now to force the members of the plaintiff class to accept on a dollar-for-dollar basis the remote benefit of an enhancement made to the reserve fund in lieu of the cash payment of interest to which they are by statute entitled.

For these reasons, I find that the contribution made by the defendant to the reserve funds of the condominium corporations following final closing does not represent a benefit in the hands of the plaintiff class which can form the subject of a counterclaim or set-off.

### (iii) Mortgage Interest

The defendant also claims the right to readjust the mortgage interest component of the interim occupancy fee with respect to 25 purchasers. The basis for this claim is that interest was charged at a lower rate than that which the defendant was entitled to charge. The amount (\$20,044.62) does represent a benefit in the hands of the purchasers, although in light of what follows with respect to the "absence of a juristic reason" element of the unjust enrichment test, I note the following. It is the evidence of representatives of the defendant that this undercharging of interest was part of the deliberately planned final closing package. The undercharging of interest was part of the defendant's business response to the various contingencies and uncertainties that have been outlined.

## 2. Juristic reason entitling the plaintiff class to retain any benefit.

Even if I am wrong and there has been a benefit conferred, there are clear juristic reasons which entitle the plaintiff class to retain that benefit, namely the closings of the contracts of purchase and sale and the statutory entitlement of the plaintiff class to the interest.

A vital function of a contract is to permit the parties to allocate and assume risks with regard to their future legal positions. As already indicated, the defendant faced a number of uncertainties or risks as it considered how to bring about final closing, and it made a deliberate calculation of those risks in determining the final closing package. It would be a startling result if a party, having assessed the risks and decided to complete a transaction on certain terms in the light of those risks, could elect to reopen the transaction when one or more of the risks does not turn out

as that party hoped. The defendant wanted the advantage of a final closing but now seeks to reverse ground and reopen the transactions in view of the fact that it wrongly predicted one of the known uncertainties. A contractual right is recognized as a juristic reason entitling a party to retain a benefit conferred: *Pettkus v. Becker*, supra. The law's general policy favouring security of transactions means that the courts will not grant restitutionary recovery where the parties have entered into a contract and that contract has not been held unenforceable or rescinded for a reason recognized by either law or equity: P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (Aurora: Canada Law Book, 1990), at p. 46. Another important reason not to permit the defendant to reopen the transactions is the fact that the plaintiff's claim to interest rests upon statute. The statutory rights conferred upon consumers by the Condominium Act cannot be bargained away: s. 61, supra. The principle established by the decision of the Privy Council in *Kiriri Cotton Co. v. Dewani*, [1960] A.C. 192 at p. 204, [1960] 1 All E.R. 177, is applicable by analogy. That case holds that if a statute imposes a duty of observing the law on one party -- "it being imposed on him specifically for the protection of the other" -- the other party can recover a payment made in a violation of the statute where both parties were acting under a mistake as to its application. It would seem to follow that there can be no claim based on unjust enrichment if the party upon whom the duty is imposed for the protection of the other seeks restitutionary recovery.

Accordingly, I find that even if there was a benefit conferred, there are juristic reasons to permit the members of the plaintiff class to retain the benefit.

## Conclusion

Accordingly, the plaintiff class is entitled to the following:

1. Judgment against the defendant for interest on dwelling unit deposits in the amount of \$617,013.75.
2. Judgment against the defendant for interest on parking and storage unit deposits in the amount of \$881,996.97.
3. Prejudgment interest on these amounts from September 4, 1990, being the mid-point date of the closings at the rate prescribed by the Courts of Justice Act, R.S.O. 1990, c. C.43, namely 13.9 per cent.

After the commencement of this action, the defendant instructed the City of Toronto to withhold payment of tax refunds owing following the successful tax appeals continued by members of the plaintiff class. Those funds together with interest to August 31, 1993 have since been paid into court to the credit of this action. The plaintiff class seeks and is entitled to the following relief in that regard:

- (a) An order that the money paid into court to the credit of this action by the City of Toronto on account of tax refunds be paid out to Andrew Frei, solicitor for the plaintiff class, to be held in trust subject to further order concerning distribution.
- (b) An order requiring the defendant to provide any further necessary written directions and sign any necessary documentation in order to direct the City of

Toronto to pay into court all refunds, plus accrued interest, in respect of appeals of municipal taxes for 1989, 1990, and 1991.

- (c) An order requiring the defendant to pay to Andrew Frei, in trust, any tax refunds received to the extent that the defendant has received or shall receive such refunds, such funds to be held in trust subject to further order of this court concerning distribution.
- (d) Judgment against the defendant for prejudgment interest on the moneys referred to in para. 4(a) from August 31, 1993 at the rate of 5.1 per cent.

All other claims, counterclaims and set-offs as between the plaintiff class and the defendant are dismissed.

As this trial effectively disposes of the issues between the parties, I will remain seized of this matter and invite the parties to make submissions as to costs and any further necessary orders, including the terms on which the matter should be referred back to Mr. Justice Winkler as contemplated by his order directing this trial of an issue.

Judgment accordingly