Court of Queen's Bench of Alberta

Citation: 934859 Alberta Ltd. v. Condominium Corporation No. 031 2180, 2006 ABQB 589

Date: 20060728
Docket: 0601 03730
Registry: Calgary

Between:

934859 Alberta Ltd.

Applicant

- and -

Condominium Corporation No. 031 2180

Respondent

Memorandum of Decision
of the
K. R. Laycock, Master in Chambers

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[1] The applicant owns 4 main floor suites in the condominium complex known as Douglas Glen Business Centre. The second floor is used as office space and has a secure access system. The elevator giving access to the second floor and all parking spaces have been designated as common property.

[2] In reliance on the Condominium Property Act RSA 2000, Ch. C-22, the applicant asks for an order declaring that the respondent is guilty of improper conduct as defined by section 67(1) or has conducted the business affairs of the respondent in an oppressive or unfairly prejudicial manner or that the powers of the board of directors of the respondent have been unfairly exercised. The applicant asks for various forms of relief directed against the condominium corporation.

[3] Section 3.3(s) of the bylaws of the condominium corporation allow the corporation to allocate expenses, costs or charges in an equitable manner as the board may determine, if the

allocation would be inequitably assessed on the basis of unit factors. Section 7.3 of the bylaws provide that contributions to common expenses shall be assessed by the corporation in proportion to the unit factors of each respective unit providing, however, that the board may, acting reasonably, assess on some other basis that is better reflective of an equitable allocation of contribution to the common expenses.

[4] The applicant claims that the respondent breached the bylaws by refusing to allocate expenses other than based on unit factors. The applicant argues that the costs of the elevator operation should be solely assessed to the second floor occupants as they are the only ones who enjoy the service. In addition, janitorial and security services are only provided to the occupants to the second floor, yet, are charged on unit factor basis. Furthermore, the first floor units have separate meters for their electrical, gas and water supplies, yet, all utilities billed to the corporation are assessed based on unit factors. The applicant suggests that only utility charges for the exterior of the building should be shared by the first floor owners.

[5] In support of the applicant's position that their costs are excessive, they compare the operating costs of a similar building in the area to their own costs which show their costs to be two and a half times more.

[6] The applicant has asked the condominium corporation board to perform a more equitable calculation of the disputed expenses. The condominium board, in response to the request brought the matter to the annual general meeting and requested the input of all owners of condominium properties in the building, after which, the board resolved not to change its assessment methodology.

[7] The applicant states that parking spaces have been allocated other than by unit factor. The current stall allocation provides 41 stalls to the main floor and 63 stalls to the second floor. By unit factor, the allocation would be 59 to the main floor and 45 to the second floor. The applicant argues that it is plain and obvious that the board favours the second floor condominium owners to the detriment of the first floor owners.

[8] The respondent argues that the court has no jurisdiction to entertain the application. In the alternative, it argues that there is nothing inherently unfair about the operating costs of the building being assessed based on unit factors. In addition, it argues that the matter is barred by the Limitations Act RSA 2000, because the applicant had knowledge of the condominium bylaws and obtained an estoppel certificate from the condominium corporation more than 2 years before this application was brought to court. And finally they argue estoppel by conduct: the applicant, having received assessment notices, financial statements and other documents from the board and having paid the assessment notices in the past, can not now complain.

[9] The respondent relies on the following authorities; ***Condominium Plan No. 9322887 v. Redweik*** [1994] A.J. No. 1020; ***Condominium Plan No. 9524710 v. Webb*** [1999] A.J. No. 10,

1999 ABQB 7; ***Condominium Plan No. 0221347 v. Ny*** [2003] A.J. No. 1227, 2003 ABQB 790 and ***Condominium Plan No. 9822595 v. Fantasy Homes Ltd.*** 2006 ABQB 325.

[10] In ***Condominium Plan No. 9322887***, the board of the condominium corporation sought to enforce its bylaws which forbade a unit owner from making alterations to their unit without prior written consent. Some condominium owners put up fences and planted vegetation, without consent, on common property. In an application by the board for an order requiring the removal of the unauthorized structures, the three opposing unit owners complained that the board was unreasonable in its interpretation of the bylaws and that the bylaws were unfair. Master Quinn determined that the court should not be involved in adjudicating on the reasonableness of the bylaws of a condominium, nor questioning how the board enforces the bylaws. At paragraph 13, Master Quinn suggested that the remedy for the unit owners, if they were unsatisfied with the bylaws, was to change them and if they were unsatisfied with the manner in which the board interpreted the bylaws they should elect a different board.

[11] In ***Condominium Plan No. 9524710***, the condominium corporation applied to the court for remedies against an owner of a unit in the development who had leased the unit to the respondent, Webb, for a reflexology, massage therapy and related therapies. To conduct his business, Webb made alternations to the unit including installing hot tubs and showers without board approval. After discovering the business in operation, the board amended its bylaws by special resolution, to specifically prohibit the use of the premises as public baths, showers, hot tubs, saunas, massage parlours and escort services. Justice Murray ordered the remediation of all unauthorized changes and gave other directions to ensure compliance with the condominium bylaws. In reaching his decision, he quoted from ***Sterling Village Condominium Inc., v. Breitenbach***, 251 So (2nd) 685 (Fla 4th D.C.A. 1971) where the court stated in part:

> ...The individual ought not be permitted to disrupt the integrity of a common scheme through his desire for change, however laudable that change might be.

[12] In ***Condominium No. 0221347,*** Justice Lee determined that a condominium unit owner had breached the bylaws and required her to vacate the property and transfer title to her parents. In reaching his decision he approved Master Quinn's determination that the court should not become involved in adjudicating the reasonableness of bylaws how the board enforces the bylaws, assuming the condominium corporation is acting strictly within its bylaws.

[13] In ***Condominium No. 9822595,*** the respondent, Fantasy Homes Ltd., was the developer of a 20 unit condominium project and at the time of the application an owner of one unit. The corporation alleged construction deficiencies which caused the corporation to extend $82,000.00 for remediation. The corporation assessed the entire amount to the respondent's one unit. Master Smart dealt with the issue of whether this was an appropriate special assessment pursuant to the Condominium Act R.S.A. 2000 Ch. C-22 and the corporation bylaws. Master Smart stated at paragraph 22, 25 & 26 as follows:

22. The more difficult question is whether or not this is a proper case for application of a Condominium Corporation's power to provide for some other basis to assess the levy than proportional and, in particular, all of it against Fantasy. The Act has no provisions prescribing either expressly or generally in what circumstances the Condominium Corporation can make an assessment other than by proportional contribution based on unit factors. Absent express language in the Act, it follows that the proper consideration in determining the appropriateness of an assessment other than by way of unit factor must be consistent with the purpose and objectives of the Act. Indeed, Justice Ritter in *Francis* commented on the change of legislation to permit this by stating 'I conclude it did so because it perceived situations, perhaps such as the one presented here, where other considerations aside from unit factors formed the appropriate basis for the attribution of condominium fees'. In *Francis* there were both residential and commercial units in the condominium corporation. Certain utilities had a single meter for the entire project and in order to allocate the liability for those utilities to the commercial premises closer to actual consumption a rebate scheme to the residential owners was developed. As noted, in *Francis,* the amendment to the Act was not yet in force but presumably that type of approach would now be acceptable under the amended legislation. In general, one might expect it to apply where an owner or group of owners receive a greater benefit from use of the common property or otherwise receive a disproportionate benefit from the funds raised by the Condominium Corporation for its administration and management.

25. Section 67 deals with Court ordered remedies where there is improper conduct. Presumably Fantasy would fall under Section 67(1)(a)(ii) and (iii), that is, the conduct of the business affairs of the Corporation or the exercise of the powers of the board is oppressive or unfairly prejudicial to or unfairly disregards the interest of Fantasy as an owner. The Court is given the power under Section 67(2) to summarily deal with abuse by the Condominium Corporation or its board and declare the subject Caveat improper together with directing its discharge. Apparently Fantasy expects that the Court would disregard the effect of Section 67(1)(a)(iv) which also defines improper conduct to include where the business affairs of a developer is conducted in a manner that is oppressively or fairly prejudicial to or that unfairly disregards the interests of an owner, purchaser or perspective purchaser of a unit. Clearly this section brings forward again the concept of fairness. The Court must look to all of the facts relevant to its assessment of conduct. In assessing the fairness of the situation the Court must examine the purported improper conduct of the Corporation and its Board in light of the owner/developers alleged improper conduct. Regardless, it seems that the Court is in a position to grant a number of remedies to deal with circumstances which fall under improper conduct.

> 26. The legislature did not enunciate circumstances where the Corporation by By-law could or should allocate financial obligations other than by way of unit factor. It is likely safe to say that this particular fact situation was not one that was brought forward as an example to justify this ability to allocate but that does not make it any the less applicable. In my view what the legislature recognized was that depending on the facts and circumstances having regard to Section 67 there may be an infinite number of circumstances where assessment otherwise than by way of unit factor would be appropriate.

[14] Master Quinn in Condominium Plan 932887 dealt with the Condominium Act 1980 and did not have to consider the Condominium Act RSA 2000 ch. C-22, section 67. Master Quinn dealt with the enforcement of bylaws against property owners for improper conduct as did Justice Murray in Condominium Plan No. 9524710 and Justice Lee in Condominium Plan No. 0221347. The issue is not the reasonableness of the bylaws but whether the condominium board acted improperly as defined by section 67. If I should find that improper conduct has taken place as defined by section 67(1), then I may grant any of the remedies set out in section 67(2). Therefore, in response to the respondent's first argument that this court has no jurisdiction to intervene, I disagree.

[15] The respondent's second basis for opposing this application is based on the Limitations Act. However, the applicant is complaining about and seeks relief from the assessment for 2005 and 2006. The fact that the applicant purchased the condominium unit more than 2 years prior to launching this application does not mean that he is barred from seeking remedies of the court for the condominium board's improper conduct which occurred within 2 years prior to the filing of these proceedings. Since the applicant is complaining about the boards conduct within the last 2 years, the limitation argument must fail.

[16] Although the respondent has argued that the applicant is estopped by conduct by bringing this application, no cases have been provided to me to support that position. The respondent has not done anything in reliance on the applicants conduct. The board has continued its method of assessment that it followed since the inception of the corporation.

[17] The respondent finally argues that there is nothing improper about the conduct of the board or the condominium corporation.

[18] The starting point of the analysis of the allegation of improper assessment must be bylaw paragraph 7.3 which is the power to determine what are common expenses. Under the definition paragraph 1.1 common expenses means:

> The expense of performance of the objects and duties of the corporation and any expenses specified as common expenses in the bylaws of the corporation.

Some common expenses are recognizable by review of the bylaws. For example, paragraph 6.1 requires the corporation to maintain insurance against fire, boiler and machinery, public liability and such other insurance for such other risks that the board my determine. Other operating expenses such as the payment of property tax are obviously common expenses. Similarly, maintenance, upkeep and repair on all of the condominiums' common property would be presumed to be common expenses. Evidence may show otherwise. Paragraph 7.3 provides such common expenses be paid by an assessment to the owners proportionate to the unit factors of their respective units. This is the starting point, but not the end. Assessing expenses according to unit factors is equitable, but the presumption is subject to variation in the event that it proves to be inequitable. In the bylaws section 3.3 (s) provides that if the allocation of expenses prove to be inequitable, the board, in such equitable fashion as they resolve, should provide for some other method of weighing, allocating and assessing the expenses.

[19] If an owner of the units in the condominium complex carries on a business which requires special security, the board may decline to hire such security and leave it with the unit owner. Alternatively, the board may, if it has some type of security in the complex, authorize increased security to the specific unit owner and allocate the extra charges for the extra security against that unit holder. The board acting reasonably would have determined that it was inequitable to assess the entire security expenses based on unit factors.

[20] The applicants complain that the elevator in this two storey condominium project benefits only the 2nd floor owners. The elevator is in common property and must be maintained by the condominium corporation. The expense for maintenance for common property would be a common expense and as a common expense would be presumed in first instance to be assessable based on unit factors. The applicant purchased its units knowing the elevator was common property. However, the board could elect to allocate more of the maintenance costs to the second floor units, if it is for their sole benefit.

[21] The applicant complains that the main floor units do not have access to 2nd floor lobbies or elevators and that the 2nd floor unit holders enjoy janitorial and other services not needed by the main floor. In particular, the main floor units have separate utility meters, so they are paying not only their own utilities, but a portion of the utilities used for the second floor and common areas. The applicant requested the board to review these matters and to determine that some of the expenses were being inequitably charged based on unit factors, rather than use and benefit. In response, by letter dated November 17th, 2005, the board of directors having reviewed the applicant's complaints responded that it would continue to assess based on unit factors. The response states in part:

> ...We believe this to be the case because it is impossible to allocate specific expenses to specific units. For example, your clients have heavy trucks delivering various items and they cause more damage and wear and tear to the pavement than other units vehicles do, but we do not charge you a larger portion of the reserve fund that will be required to resurface or repair the asphalt. We have to shovel the

> sidewalks directly in front of your units, but we all pay for the snow clearing. We water and care for the landscaping outside the units, but we all pay for landscaping. You have lights illuminating your signs but we all share in the cost of electricity. Your units may use the garbage containers more, but we all share in the expenses. As you see it is not possible to allocate the expenses other than based on unit factors.

[22] The point being made by the applicant is reinforced by the comments in the letter of November 17th, 2005. Some services, repairs and maintenance benefit some unit holders more than others. Acknowledging this fact, the board may attempt to allocate unequally, some expenses to the unit owners, based on their perception of benefit. Alternatively, the board may conclude that sharing based on unit factors is reasonably equitable. Has the board unfairly disregarded the applicant's interest, or acted in an oppressive or prejudicial fashion?

[23] The annual 2006 budget expenses totals $89,830.77. The charges that the applicant complains should be paid by the second floor only, total $28,550.00 or 31.78% of the budget. The board has not disputed the fact that these services benefit only the second floor owners. The boards claim that these expenses are offset by other expenses that are for the sole benefit of the main floor, therefore equity is preserved. Shovelling the walks and watering the flowers (assuming that this only benefits the main floor) is only a small part of snow removal and landscaping expenses. Extra wear and tear on the parking lot by the main floor customers is impossible to prove or calculate. The suggestion that the main floor used more garbage space is speculation. It seems to me that the board is stretching to show that these other expenses offset the items complained about by the applicants. They are at best nominal.

[24] An examination of the annual budget reveals utility charges of $18,550.00 for gas, power, water and sewer. If the main floor owners pay all their own charges separately, then the board has acted unfairly toward the main floor owners. The board should levy most of these charges (recognizing some amount for outside signage benefits the main floor) against the second floor only or add the main floor utilities to the budget and pay them. If the board pays the main floor utilities and adds them to the budget and assessed them to all unit holders based on unit factors, fairness may be achieved.

[25] If the janitorial service is for the cleaning of the second floor offices and the second floor corridor then the whole $7,000.00 should be an expense paid by the second floor only.

[26] The elevator maintenance expense is more problematic. While it is used for the second floor owners and their customers, it is an integral part of the building. It may benefit the second floor more than the main floor, but is nevertheless an asset of the corporation that enhances the value of the building. Maintenance of the elevator is important to the building itself. It is different from merely cleaning carpet in the halls. Generally, structural repair of common property should be shared by all owners by unit factor.

[27] Security has been reduced from $4,500.00 in 2005 to $1,800.00 in 2006. The only evidence is that the security is solely for the benefit of the second floor and it should be paid for by them.

[28] Finally, the applicant complains that the parking is allocated other than by unit factor. The Respondent has given no explanation for that allocation which should be based on unit factor. They have failed to show that it is equitable to allocate based on other factors that are fair to all.

[29] The Condominium Property Act s. 67(2) allows the court to do one or more of the following:

> (c) give directions as to how matters are to be carried out so that the improper conduct will not reoccur or continue;
> (d) if the applicant suffered loss due to the improper conduct, award compensation to the applicant in respect of that loss;
> (e) award costs:
> (f) give any other directions or make any other order that the Court considers appropriate in the circumstances.

[30] In my opinion the board has unfairly disregarded the interests of the applicant and the other main floor owners. The board shall reallocate the costs of utilities as noted above and charge only the second floor owners with the expenses for security and janitorial expenses. Additionally the parking shall be reallocated based on unit factors. The parking spaces shall be allotted to the unit owners fairly, having regard to the location of the spaces in relation to the owners' units. The applicant shall be entitled to its costs of the application payable by the Respondent. These costs and the legal fees payable to the respondent's own counsel shall not be an expense allocated to the applicant in any future assessment.

Heard on the 16th day of June, 2006.
Dated at the City of Calgary, Alberta this 28th day of July, 2006.

K. R. Laycock
M.C.Q.B.A.

Appearances:

Richard I. John
for the Applicant

John McDougall
(Scott Hall LLP)
for the Respondent