

ONTARIO

SUPERIOR COURT OF JUSTICE

06 173 048

B E T W E E N:)
)
BRIDGE BAHADOOR) **The Applicant appearing in person**
 Applicant)
 (Responding Party))
)
 - and -)
)
YORK CONDOMINIUM) **Marko Djurdjevac, for the Respondent**
CORPORATION NO. 82)
 Respondent)
 (Moving Party))
)
 - and -)
)
SURENDRA LOCHAN,) **Derrick M. Fulton, for the**
BRIAN RITCHIE, SHEIKH KARRIM,) **Added Respondents**
ABDOOL WAHAB and)
BERNARD PICKETT)
 Added Respondents)
 (Responding Parties))
)
)
) **HEARD: May 19, 2006**

Spence J.

REASONS FOR DECISION

[1] The Respondent York Condominium Corporation No. 82 ("YCC 82") is subject to the Court Order dated March 1, 2004 (the "Appointment Order") which appointed Fengate Property Management Ltd. (the "Administrator") as administrator of the property and assets of YCC 82 pursuant to s. 131 of the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "Act").

[2] YCC moves for the approval of the Fourth Report of the Administrator and for directions relating to a proposed borrowing by YCC 82 of \$5.9 million (the "Loan").

[3] The Added Respondents, who are a group of unit owners in YCC 82 (the "Owner Group"), move for an order to terminate the administration by the Administrator and orders contrary to those sought by the Administrator and for orders for the transition of the affairs of YCC 82 from the Administrator to an elected Board of Directors.

[4] The Applicant ("Bahadoor"), also a unit owner, supports the motion of the Owner Group and seeks orders for certain of the relief sought by the Owner Group and certain other relief.

Termination of the Administration; Approval of the Fourth Report

[5] In summary terms, the grounds advanced for the removal of the Administrator are that the Administrator has not carried out its mandate satisfactorily and that it is now possible to elect a competent and functional board of directors, so there is no good reason to continue the administration.

Activities of the Administrator

[6] The affidavit of Mr. Lochan, a member of the Owner Group, sworn May 11, 2006, sets out, a paragraph 26 to paragraph 83, particulars of his complaints about the activities of the Administrator.

[7] Counsel for the Owner Group referred briefly to these complaints and provided a summary to the following effect: The reserve fund has been spent, expenditures are materially over budget, no work has been done on certain material items and is incomplete on others and now the Administrator states that it is necessary to borrow a further amount (the "Additional Loan") in excess of \$5 million (*i.e.* additional to the previously authorized \$4 million loan) to complete the work that is necessary to put the property in fit condition.

[8] Mr. Bahadoor, in his affidavit sworn May 17, 2006, sets out principally at paragraphs 9 through 33, his complaints about the activities of the Administrator. These complaints include the fees of the Administrator, over spending on the budget, the high cost of repairs, and the proposed loan in November 2004. These matters, to the extent they relate to periods covered by previous reports of the Administrator, have effectively been dealt with by the Court approval that has been given to those reports. Mr. Bahadoor's complaint also address matters raised in the current report of the Administrator that is now before the Court for approval. Mr. Bahadoor also complains about the conduct of the Administrator in its dealings with him.

[9] The complaints of the Owner Group and Mr. Bahadoor include reference to the adverse effects of the incurred and prospective increased costs of the administration upon the unit owners. The common element expense for unit owners has increased and is expected to

increase further. They express the concern that the proposed loan will exacerbate that effect and/or further reduce the already relatively low market value of their units.

[10] Mr. Bahadoor complains that the Administration has been spending unnecessarily with respect to the exploration of the potential prospects for the sale of YCC 82 as an entirety.

[11] The Administrator provided its response to the complaints in its written material and its submissions at the hearing which are on the record.

[12] Based on all the materials and submissions, it cannot be concluded that the Administrator has failed to carry out its responsibilities properly.

[13] Accordingly, it does not appear that the complaints about the conduct of the Administrator are such as to warrant the termination by this Court of the appointment of the Administrator. Nor do they warrant the deferral of approval of the Fourth Report of the Administrator as set forth starting at paragraph 31 of the Affidavit of Paul Endres dated February 9, 2006. The report is approved, but subject to what is said below.

The Approval of Additional Borrowing

[14] The Administrator submits that based on s. 56(3) of the Act and the Appointment Order it has the power to authorize the Additional Borrowing without first obtaining the approval of the unit holders, because the Administrator has authority to exercise the powers and duties of the board of directors. YCC 82 has a general borrowing by-law and s. 56(3) requires a by-law for specific borrowing only where the expenditures to be financed are not listed in the budget for the current fiscal year, and the proposed expenditures are in the current budget.

[15] The Appointment Order provided in paragraph 1 that the appointment of the Administrator is subject to further orders of the Court and in paragraph 17 that the Administrator may apply to the Court for directions.

[16] The order of Cameron J. dated November 22, 2004, which provided for the borrowing of \$4 million, required approval of the unit holders for a by-law to authorize that borrowing.

[17] In view of the terms of these Orders and the significant impact of the Additional Borrowing on the unit holders, the Administrator is hereby required not to proceed with the Additional Borrowing unless a by-law has been passed specifically to authorize such borrowing and the by-law has been made effective pursuant to s. 53(10) of the Act by the approval of the votes of the owners of a majority of the units of the corporation confirming it, with or without amendment.

[18] The disclosure material for the meeting in regard to the Additional Borrowing should state whether, if the Additional Borrowing is not approved, the Administrator proposes instead to proceed to raise the same or similar funds by levying a special assessment pursuant to paragraph 12 of the Appointment Order.

Sale of the Building

[19] The Administrator says that it has undertaken its sale efforts because of direction given to it in the court Orders. The Owner Group does not seem to be concerned about the efforts that have been made.

[20] The appropriate way to deal with the complaint of Mr. Bahadoor in this regard is to refer to a vote of the unit owners the question whether they wish the Administrator to continue with such efforts or, alternatively, to cease such efforts subject only to any existing contracts for services in this regard which cannot be terminated without undue cost.

Election of a Board of Directors

[21] A principal reason for the appointment of the Administrator was that the Board of Directors at the time was dysfunctional. The Owner Group say that a competent and functional board can now be elected and that that election should be permitted so the board can assume its proper responsibilities and the administration be terminated. Mr. Bahadoor submits that the administration has gone on much longer than was originally contemplated.

[22] The Administrator says that YCC 82 was dysfunctional in ways that were not limited to the problems on the board. A basic problem then and one that is still operative now, according to the Administrator, is the unwillingness of unit owners to make the necessary financial arrangements for the proper operation of YCC 82. The Administrator says that the work mandated to be accomplished has not been finished and there are serious risks, in view of the evident unwillingness of unit owners to accept the need for further major expenditures, that the condominium will not be brought to a satisfactory condition, with potential attendant risks to health, safety and security.

[23] Section 17 of the Act provides that the objects of a condominium corporation are to manage the property and the assets of the corporation "on behalf of the owners", which would reasonably mean in the best interests of the owners, including complying with the requirements imposed by the Act on the corporation and its owners with respect to such matters as maintenance and repairs.

[24] Section 131(2) provides that the Court may make an order appointing an administrator if the Court is of the opinion that it would be just and convenient, having regard to the scheme and intent of the Act and the best interests of the owners.

[25] The Owner Group has provided a list of owners who they say would be prepared to serve on the board. There is no suggestion that they are not satisfactory persons for that purpose. The Administrator warns that unit owners will not be prepared to undertake the necessary financial obligations. Whether that is so cannot be determined at this stage.

[26] Whether or not the administration has gone on longer than was originally contemplated, the required work has involved considerably greater cost than was originally

contemplated and based on the assessment of the administrator, will cost a great deal more, and these increased costs must be borne by the unit holders.

[27] In view of the provisions of the Act and the considerations noted above, it is timely to refer the question of whether the administrator should continue or instead be terminated and replaced by an elected board to a vote of the unit holders. That question should be decided at a meeting of the unit holders by the votes of the owners of the majority of the units. If the unit holders decide that the administration should be terminated and if the unit holders elect a new board of directors, those decisions should then be submitted to the Court for approval.

[28] Subject to any request for different directions, it would be appropriate for the questions as to the termination of the administration and the election of the board of directors to be put to the same meeting of unit holders that is to consider the questions of the approval of the Additional Borrowing and the continuation of the sale efforts.

[29] The disclosure material for the meeting should state what the plans of the proposed board are with respect to the appointment of a property manager, including any proposal to appoint a facilitator to assist in the transition from the administration to the subsequent management.

[30] The requirement that any resolution to terminate the administration and electing a new board must come back to the Court for approval is not a formality. The vote for the unit holders is necessary and important for the reasons given above. But the vote of the unit holders cannot be the sole determining factor whether to replace the administration with a new board, because their interests are not the only interest at stake. This point is stated clearly in the following remarks of the Court in the decision in *York Condominium Corporation No. 482 v. Christiansen*, [2003] O.J. No. 343 (S.C.J.) at para. 5:

...A principal object of the Act is to achieve fairness among the parties - owners, their tenants, their mortgagees, the corporation itself - in raising the money to keep the common enterprise solvent. Hence the Act provides for owners to contribute to the fund for common expenses in the proportions specified in the Declaration, which normally means in accordance with the number and size of the units which they own. This common expenses fund is the central financial mechanism of the corporation and the duty of contributing to it is the central mechanism to achieve financial fairness among the owners. If one owner fails to pay, the others must bear his burden; the expenses are not optional and they do not just go away.

[31] If a decision is taken to terminate the administration and a board of directors is elected and if those decisions are approved by the Court, the further implementation of the Fourth Report after the assumption by the board of directors of its responsibilities would be for the board to decide, subject to contractual obligations then in place.

[32] Orders to go in accordance with the above reasons for decision. No other orders are necessary at the present time based on the motions now before the Court. The parties may seek directions from the Court if necessary to settle the terms of the orders and as to their implementation and as to costs.

Spence J.

Released: June 20, 2006

COURT FILE NO.: 04-CV-264294CM2
DATE: 20060620

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SUPERIOR COURT OF JUSTICE

B E T W E E N:

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YORK CONDOMINIUM CORPORATION NO.
82

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SURENDRA LOCHAN,
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REASONS FOR JUDGMENT

Spence J.

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