Court of Queen's Bench of Alberta

Citation: Owners: Condominium Plan No. 982-2595 v. Fantasy Homes Ltd., 2006 ABQB 325

Date: 20060503
Docket: 0403 20763
Registry: Edmonton

Between:

The Owners: Condominium Plan No. 982 2595

Applicant

- and -

Fantasy Homes Ltd.

Respondent

Reasons for Decision
of
L. A. Smart, Master in Chambers

Introduction

[1] Fantasy Homes Ltd. ("Fantasy") was the developer of a twenty unit condominium project located in southeast Edmonton, known as Victoria Village. Fantasy at the relevant time was the owner of one unit in Victoria Village. The Applicant (the "Condominium Corporation") alleges that there are construction deficiencies associated with the common property. In some cases it is alleged that there has been a failure to construct and in others failure to complete construction in relation to curbs, gutters, paving, a retaining wall, fences, an electric gate, property identification signage and lighting. Apparently some of these deficiencies have been completed subsequent to Affidavits and argument being filed with the Court. The Condominium Corporation has established the cost to rectify the deficiencies at $82,000.00. Fantasy has disputed the amount needed to rectify the deficiencies, whether some of the alleged deficiencies were to be part of the construction at all, and complains that it is prepared to rectify the deficiencies but has been

precluded from entering upon the lands to do so. These other matters form part of a larger action between the parties. The sole issue I have been asked to decide is whether or not a special assessment made by the Condominium Corporation purporting to charge the entire alleged cost to correct all of the deficiencies as against the one unit owned by Fantasy is valid and properly supported the Caveat registered against that unit. It is my understanding that the Fantasy unit has now in fact been sold and a sum of money has been set aside to stand in the place and stead of the interest that had been protected by the Caveat.

[2] A Reserve Fund Study was commissioned and prepared for the Condominium Corporation by Wm. A. Kerr on July 24, 2003. This study has identified "Deficiencies or Short Term Priorities" as described above and determined that a special levy of $82,000.00 was necessary.

[3] Ostensibly the Reserve Fund Study was prepared to satisfy the Condominium Corporation's requirement pursuant to section 38(1) of the *Condominium Property Act,* RSA 2000 c. C-22. Section 38(1) reads as follows:

> 38(1) A corporation shall, subject to the regulations, establish and maintain a capital replacement reserve fund to be used to provide sufficient funds that can reasonably be expected to provide for major repairs and replacement of
>
> (a) any real and personal property owned by the corporation, and
>
> (b) the common property,
>
> where the repair or replacement is of a nature that does not normally occur annually.

The Reserve Fund Study provides the basis upon which the amount of the Capital Replacement Reserve Fund is established, among other things.

[4] The Condominium Corporation amended its by-laws on September 15, 2004 to include the following:

> 40(1) This bylaw shall be automatically repealed upon the resolution of the Board that the Corporation's claims against Fantasy Homes Ltd., as developer of the condominium project known as "Victoria Village", have been satisfied in full.
>
> (2) Notwithstanding defects or irregularities, if any, in procedure or process, the actions and resolutions of the Board in:

(a) commissioning and obtaining the Reserve Fund Study prepared by Condominium Consultants Canada Inc., dated June 24, 2003, and adopting a reserve fund plan; and

(b) acting to implement its recommendations by retaining and instructing counsel to advance all claims available to the Corporation against Fantasy Homes Ltd., as the Developer of the Corporation's condominium project;

are hereby ratified and approved.

(3) A contribution, by Special Levy in the sum of $82,000 as called for in the Reserve Fund Study mentioned in subsection (1), shall be made upon Fantasy Homes Ltd., the owner of unit 11, such Special Levy to be due and payable forthwith upon this amendment of the bylaws.

(4) The contribution referred to in subsection (3) shall bear interest at the rate of 18% per annum forthwith upon this amendment of the bylaws until paid.

(5) The requirements of bylaw number 36, providing for at least 14 days notice of proposed amendments of the bylaws, are deemed to have been satisfied.

[5] A Caveat claiming an interest for the unpaid levy of $82,000.00 was registered against the title of the unit owned by Fantasy on September 21, 2004. Fantasy's response to the Bylaw and Caveat is that it is merely a colourable attempt to force Fantasy to create or fund the Capital Replacement Reserve Fund. Such a Fund, it is argued, is not to be used to make capital improvements arising from deficiencies in construction but for the repair or replacement of common property where it is of a nature that it does not normally occur annually.

[6] Furthermore, Fantasy argues, section 14 of the Act provides for the developer to hold in trust sufficient funds when combined with the unpaid portion of the purchase price of a unit, if any, to pay based on the unit factors of the units sharing in the same common property the proportionate costs of substantially completing the construction of the common property as determined by a cost consultant. Fantasy submits that in a sense Mr. Kerr acted as a cost consultant and has purported to determine the cost of completing the construction of the common property. The remedy available to the Condominium Corporation is under section 14 of the Act and not by way of a special levy for a reserve fund. Fantasy emphasizes that the language of section 14 contemplates retention of a proportionate cost from each unit based on unit factors and that a special levy assessed against one unit (which happens to be owned by the developer) is inconsistent with the proportionality concept.

[7] Finally, Fantasy argues that the special levy against its unit breaches section 11 of the Act which contemplates fair dealing between a developer and a purchaser and ostensibly seeks relief from what is characterized as "improper conduct" under section 67 of the Act. It is argued that there is no reasonable basis on which to assess the entire special levy against its unit and that

there must be an element of fairness present to assess a levy on a basis other than in proportion to the unit factors of the owners respective units. It is pointed out that otherwise Condominium Corporations could arbitrarily assess all future financial obligations against one owner or potentially suspend all rights and privileges of one owner potentially resulting in a unit being of no value.

[8] When interpreting the Act to determine the validity of the Caveat and underlying Bylaw, I must bear in mind the purposive and contextual approach to statutory interpretation endorsed by the Supreme Court of Canada: ***Re Rizzo v. Rizzo Shoes***, [1998] 1 SCR 27; ***Bell Express Vu Limited Partnership v. Rex*** [2002] 2 SCR 599, 2002 SCC 42. This requires that I assess the Act in light of its purpose since legislative intent is directly linked to legislative purpose. Words chosen must be assessed in the entire context in which they have been used.

[9] It is important to note at the outset that a Condominium Corporation is created by statute owing its existence to that statute and can only take actions that the statute specifically authorizes. A Condominium Corporation does not enjoy the same powers of a natural person rather section 20(4) of the Act states that the *Business Corporations Act*, RSA 2000, c. B-9, which attributes natural person powers to corporations created under it, does not apply to a Condominium Corporation: ***Condominium Plan No. 822 2909 v. Francis***, 2003 ABCA 234 (Francis).

[10] In light of this characterization one must start with the provisions in the Act which set out powers. Section 25 of the Act provides that on registration of a condominium plan there is constituted a corporation and provides in subsequent subsections as follows:

> 25(2) A corporation consists of all those persons
>
> (a) who are owners of units in the parcel to which the condominium plan applies, or
>
> (b) who are entitled to the parcel when the condominium arrangement is terminated pursuant to section 60 or 61.
>
> (3) Without limiting the powers of the corporation under this or any other Act, a corporation may
>
> (a) sue for and in respect of any damage or injury to the common property caused by any person, whether an owner or not, and
>
> (b) be sued in respect of any matter connected with the parcel for which the owners are jointly liable.

[11] In addition the following subsections from section 37, 38 and 39 are applicable. Section 38 was set out above. Relevant subsections from 37 and 39 are set out below:

37(1) A corporation is responsible for the enforcement of its bylaws and the control, management and administration of its real and personal property and the common property.

(2) Without restricting the generality of subsection (1), the duties of a corporation include the following:

(a) to keep in a state of good and serviceable repair and properly maintain the real and personal property of the corporation and the common property;

(b) to comply with notices or orders by any municipal authority or public authority requiring repairs to or work to be done in respect of the parcel.

39(1) In addition to its other powers under this Act, the powers of a corporation include the following:

(a) to establish a fund for administrative expenses sufficient, in the opinion of the corporation, for the control. management and administration of the common property, for the payment of any premiums of insurance and for the discharge of any other obligation of the corporation;

(b) to determine from time to time the amounts to be raised for the purposes mentioned in clause (a);

(c) to raise amounts so determined by levying contributions on the owners

(i) in proportion to the unit factors of the owners' respective units, or

(ii) if provided for in the bylaws, on a basis other than in proportion to the unit factors of the owners' respective units;

(2) A contribution levied as provided in subsection (1) is due and payable on the passing of a resolution to that effect and in accordance with the terms of the resolution. and may be recovered by an action for debt by the corporation

(a) from the person who was the owner at the time when the resolution was passed, and

(b) from the person who was the owner at the time when the action was instituted,

both jointly and severally.

(7) A corporation may file a caveat against the certificate of title to an owner's unit for the amount of a contribution levied on the owner but unpaid by the owner.

(8) On the filing of the caveat under subsection (7), the corporation has a charge against the unit equal to the unpaid contribution.

(9) A charge under subsection (8) has the same priority from the date of filing of the caveat as a mortgage under the Land Titles Act and may be enforced in the same manner as a mortgage.

[12] As noted above the Condominium Corporation had a reserve fund study completed. It identified some $82,000.00 in deficiencies. Fantasy takes the position that deficiencies are not in the nature of repair or replacement. Section 14 of the Act provides for the developer to hold a proportionate amount in trust to complete construction related to the common property as determined by a cost consultant based on the unit factors of the units. This is one aspect of consumer protection which the Act has established to deal with the types of deficiencies complained of in this case. It is ostensibly argued that in light of these provisions there is an occupying of the field of sorts and the Condominium Corporation is restricted to that remedy. Although counsel was unable to advise whether or not funds were actually held in trust, it is apparent, at least to me, that it is unlikely the Condominium Corporation would have taken these rather dramatic steps if it were shown that sufficient funds were in fact held in trust and available to remedy the deficiencies. Unfortunately I am left to speculate in this regard but regardless in my view simply because one approach or remedy is available under the Act, it does not necessarily govern what other sections in the Act may be available or the approach to be taken thereunder.

Reserve Fund

[13] Section 39(1)(a) provides for the power of a corporation to establish a fund for the discharge of any obligation of the corporation. This includes the obligation to establish the Capital Replacement Reserve Fund. Section 39(1)(c) permits the Corporation "to raise amounts so determined by levying contributions on the owners: (i) in proportion to the unit factors of the owners' respective units, or (ii) **if provided for in the bylaws**, on a basis other than in proportion to the unit factors of the owners' respective units;". (emphasis mine)

[14] One issue to be addressed is whether or not it is contemplated that the correction of the deficiencies amount to a repair or replacement as part of the Capital Replacement Reserve Fund. Based on the material before me it does not appear that it would be necessary to do something which constituted replacement to rectify the deficiencies and therefore the question is whether or not the correction of the deficiencies constitute repair. The definition of repair was examined by the Ontario Court of Appeal in ***York Condominium Corp. No. 59 v. York Condominium Corp.***

No. 87, 148 DLR (3d) 660. In that case two condominium complexes were adjacent to one another and shared a number of common elements including a swimming pool and a swimming pool area. The pool remained problem free for some years when the roof of the pool began to leak. It was assumed that the leak was caused by a structural defect arising from certain omissions made by the contractor during construction. The parties were unable to agree as to how to pay for the repairs and ultimately one of the corporations proceeded with the repairs and brought action against the other to recover half of the costs. That party took the position that it should not be required to contribute to the cost of the repairs as they were caused by a structural defect and not by wear and tear. Justice Cory (then of the Ontario Court of Appeal) dealt with the definition of repair as follows:

> "Although this case does not deal with individual condominium owners within a single condominium, it is concerned with the relationship between two condominium corporations which form integral parts of a composite plan for condominium living. The development plan contemplated the mutual enjoyment and use of the pool by the occupants of both condominium corporations. The mutual enjoyment of a facility calls for a mutual obligation of repair.
>
> The concept of repair in such a situation should not be approached in a narrow legalistic manner. Rather, the court should take into account a number of considerations. They may include the relationship of the parties, the wording of their contractual obligations, the nature of the total development, the total replacement cost of the facility to be repaired, the nature of the work required to effect the repairs, the facility to be repaired and the benefit which may be acquired by all parties if the repairs are effected compared to the detriment which might be occasioned by the failure to undertake the repairs. All pertinent factors should be taken into account to achieve as fair and equitable a result as possible.
>
> The declaration of the parties make reference to the "maintenance" and "repair" of the recreational facility. The Shorter Oxford English Dictionary defines these words in part as follows:
>
> > "repair" - to restore to good condition renewal or replacement of decayed or damaged parts or by refixing what has given way; to mend;
> >
> > "maintain" - to keep in repair;
>
> There is nothing in these definitions that would restrict or narrow their meaning as contended by the appellant. Rather, giving these words their ordinary meaning, they are quite sufficient to encompass the repairs required to the roof of the pool. There is no reason why the appellant should not be obligated to pay its share for the "renewal or replacement of the decayed or damaged parts".

> I am strengthened in this position by the decision of the Supreme Court of Canada in *Canadian Pacific R. Co. v. Grand Trunk R. Co.* (1914), 49 S.C.R. 525, 20 D.L.R. 56, 17 C.R.C. 300. In that case consideration was given to the word "maintain" which appeared in a contract between the parties. It was decided that in construing the word regard should be had to the relationship between the parties and the scope and nature of their agreement. As a result, the word was held to be extensive enough to include the reconstruction of a bridge so that it could service an increased flow of traffic."

[15] Black's Law Dictionary defines repair as "to mend, remedy, restore, renovate." It goes on to provide further description consistent with the Shorter Oxford English Dictionary definition set out in the ***York*** decision. It seems to me that there are two perspectives from which one must examine the current circumstances. We have a condominium project which has been constructed with a number of deficiencies. In some cases the deficiency is the failure to construct at all. An example is the retaining wall required to deal with the overall drainage scheme for the parcel comprising the condominium project and its conformance with the overall drainage plan for the Millwoods district of the City of Edmonton. In this instance the failure to construct the retaining wall is a fundamental defect affecting the project and the Condominium Corporation as a whole. The project is foreseeably at risk with substantial danger to health and safety in the event of flooding due to improper drainage. In such a context one would have to say that this project is in serious need of repair.

[16] The second type of deficiency arises, for example, from the failure to place a second level of asphalt in the parking lot. Failure to lay the second level is fundamental to the ability of the parking lot to function as such. It seems to me in this context it would be a fallacy to require the Condominium Corporation to wait until there was a failure in the asphalt before the defect in the parking lot can properly be said to be in need of repair.

[17] Giving the appropriate broad, liberal and remedial interpretation of the Act and having regard to the considerations enunciated in ***York***, I am of the view that the deficiencies complained of by the Condominium Corporation constitute repairs within the context of the Capital Replacement Reserve Fund contemplated by the Act.

General Assessment

[18] If I am incorrect in the foregoing analysis with respect to repairs then regard must be had to the meaning of section 37(1) and (2). Section 37(2) in a non-limiting way describes the duty of the Condominium Corporation to keep the common property in a good and serviceable state of repair and keep it properly maintained. Considering the analysis in the ***York*** decision and its conclusion as to what may be included in the requirement to "maintain", the work described in the reserve fund study appear to be readily captured by that language. Even so as noted the subsection is non-limiting, and ensuring that the common property is constructed or properly constructed in the first instance is fundamental to the control, management and administration as prescribed in section 37(1).

[19] From section 39(1) it is within the Condominium Corporation's powers to make assessments to achieve the control, management and administration of the common property. In particular, section 39(1)(c) expressly provides for the levying of contributions on the owners on a basis other than in proportion to the unit factors of the owners respective units **if provided for in the bylaws**. This particular provision was enacted in 1996 but was not proclaimed until September 1, 2000 subsequent to the factual circumstances considered in ***Francis***.

[20] In this case the requirement for a bylaw has been completed. The language of the Bylaw captures the subject-matter of the deficiencies assuming my analysis with respect to the definition of repair is correct. It is, however, necessary to take a closer look at the Bylaw to determine if the assessment is properly characterized as a duty under section 37 of the Act. Subsection (3) of the Bylaw calls for a contribution by special levy "as called for in the reserve fund study". If the rectification of the deficiencies are not repairs then the Bylaw arguably purports to make a levy where none is permitted by the Act.

[21] The Bylaw's purpose is to allocate the levy as permitted by Section 39(1)(c) and although the sum arrived at is called for in a document which is entitled a "Reserve Fund Study" reference to that study in my view is merely descriptive and referential for the establishment of the amount. No Bylaw is necessary to make an assessment for the Capital Replacement Reserve Fund or for other management and administration obligations pertaining to the common property.

Allocation and Fairness

[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 in 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 a 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. It would seem it may be equally applicable

where an owner has caused an injury or loss to the Condominium Corporation where there is no other source for compensation such as insurance. Fantasy argues that the Condominium Corporation has no valid reason to single it out to bear the whole of the special levy and that there must be some element of fairness present (which they say is lacking in this case) to assess a levy on a basis other than in proportion to the unit factors.

[23] The basis for an assessment other than by unit factor must be a legitimate assessment having regard to the purpose and objects of the Act. The Act permits the creation of a unique scheme for the ownership of land. It provides some guidelines and rules related to their development along with an element of consumer protection. Finally it provides for a mechanism to manage and administer a complex joint ownership structure having regard to the need for responsible and efficient management of the common elements created by that structure. It includes the ability of a majority to control the administration and management of the property which permits infringement upon property rights otherwise enjoyed by a fee simple owner of real property. Each case must be examine and assessed on the basis of the facts and circumstances within the context of the scheme of the Act. The Condominium Corporation has an obligation to ensure that the improvements constructed or to be constructed as part of the common property are in the first instance completed and in a good and workmanlike manner. The question remains whether or not in this case it is appropriate to charge the entire amount required for construction deficiencies against a unit owned by the developer of the project. It may well be fortuitous that Fantasy has retained a unit in the complex for sufficient time for the Condominium Corporation to determine the extent of the problem and take the necessary steps to respond including the making of a levy.

[24] Fantasy says that there is a duty of fair dealing prescribed by Section 11 of the Act:

> 11 Every agreement to sell a unit imposes on the developer selling the unit and the purchaser of the unit a duty of fair dealing with respect to the entering into, performance and enforcement of the agreement.

The section imposes a duty of fair dealing with respect to the agreement of purchase and sale of a unit. As it may be argued that this levy finds its genesis in the initial transaction I am prepared to accept that there is a general duty of fairness as between the developer and a purchaser which is impressed upon the Condominium Corporation. Section 67 of the Act also deals with the concept of fairness. Strangely, Fantasy's Notice of Motion and its written brief at page 4 reference Section 67 but there is nothing more. Regardless Section 67 reads as follow:

> Court ordered remedy
>
> 67(1) In this section,
>
> (a) "improper conduct" means

(i) non-compliance with this Act, the regulations or the bylaws by a developer, a corporation, an employee of a corporation, a member of a board or an owner,

(ii) the conduct of the business affairs of a corporation in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party,

(iii) the exercise of the powers of the board in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party,

(iv) the conduct of the business affairs of a developer in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party or a purchaser or a prospective purchaser of a unit, or

(v) the exercise of the powers of the board by a developer in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party or a purchaser or a prospective purchaser of a unit;

(b) "interested party" means an owner, a corporation, a member of the board, a registered mortgagee or any other person who has a registered interest in a unit.

(2) Where on an application by an interested party by means of an originating notice the Court is satisfied that improper conduct has taken place, the Court may do one or more of the following:

(a) direct that an investigator be appointed to review the improper conduct and report to the Court;

(b) direct that the person carrying on the improper conduct cease carrying on the improper conduct;

(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.

(3) The Court may grant interim relief under subsection (2) pending the final determination of the matter by the Court.

[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.

[27] Having regard to the purpose and objectives of the Act, I have no difficulty concluding on the basis of fairness that this is a proper circumstance for allocation against one owner's unit albeit arising from what appears to be misconduct of that owner as a developer. I am bolstered in my view in reaching this conclusion as otherwise the developer would retain a benefit for itself by in effect taking a profit while failing to meet its obligations to the Condominium Corporation which by definition is all of the owners including the developer as owner.

Conclusion and Decision

[28] Based on the above and in particular having regard to the overriding obligation of fairness contemplated by the Act, I am of the view that the By-law passed by the Condominium Corporation allocating the entire cost to rectify the deficiency as against Fantasy's unit is valid. It necessarily follows from that the Caveat is valid. In making this determination, I again note that there remain outstanding issues between the parties which may affect the ultimate liability of Fantasy. The Applicant shall have costs of this application on column 1 of schedule C.

Heard on the 13th day of July, 2005.

Dated at the City of Edmonton, Alberta this 3rd day of May, 2006.

L. A. Smart
M.C.C.Q.B.A.

Appearances:

Curtis Long
for the Applicant

Jason Van Doesburg
Campbell & Van Doesburg
for the Respondent