Court of Queen's Bench of Alberta

Citation: Langager v. Condominium Plan No. 762 1302, 2007 ABQB 793

Date: 20070802
Docket: 0703 03917
Registry: Edmonton

Between:

Kaye A. Langager

Plaintiff

- and -

The Owners: Condominium Plan No. 762 1302 (The Saskatchewan Condominium Corporation)

Defendant

Reasons for Judgment
of
J. B. Hanebury, Master in Chambers

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[1] In 1999 Kay Langager bought a penthouse condominium in Saskatchewan House. It had a large roof top patio. She believed that the entire patio was considered part of her unit but subsequently discovered that this was not the case and the patio to which she was entitled pursuant to the condominium plan was considerably smaller. The balance of her outdoor space, an area the parties call the extended deck area, was part of the roof and was common property. A previous owner had developed it into a deck in 1977, with the permission of the condominium corporation. Only Ms. Langager and the owner of the one other penthouse unit had these decks on the common property roof area as the building was inset at their floor. The owners below them all had balconies.

[2] The building is an older building that was converted to 80 condominiums in 1974. As the building ages, the condominium corporation says that it has found itself dealing with increasing

common property maintenance expenses. The penthouse owners' use of the extended deck area has caused some increased costs for the corporation over time. The first owner of Ms. Langager's unit unilaterally decided to put up a sauna in the extended area and it resulted in litigation by the corporation to get it removed. The corporation paid for the removal of the sauna. In 2002 the corporation dealt with water leakage and mould remediation for the unit under the extended deck area of the other penthouse unit, at a cost of $13,000. It appears that the railings installed by that penthouse owner may have caused the leakage.

[3] Then in 2004 the other penthouse owner had water leakage through the base walls of the unit and there were problems getting the roof repaired. Working on the roof requires the removal of the railings on the extended deck areas and raises issues with the two owners about who will pay for those costs. In the spring of 2006 two units under the other penthouse owner had leaks.

[4] Ms. Langager advises that her deck did not leak, but in the eight years she has had the unit, she has only been able to use the extended deck area for approximately half of that time as maintenance and repairs to the roof were an issue.

[5] There is a history to the question of liability for the extended deck area. Documentation filed notes that in 1980 the condominium board advised a previous owner that "when an owner makes alterations (with the permission of the Board) it is on the understanding that the owner assumes any additional maintenance cost that might be associated with the alteration. An example (for purposes of illustration) would be leaks in the roofs of the apartments below your deck area. ...a leak below the "new" deck would result in you being asked to assume the cost of removing and replacing the deck boards..." Correspondence in 1982 notes that the board hadn't received an encroachment document to deal with the extended deck areas and a member of the Board at that time noted that "in theory it may be possible to formulate an agreement with PH1 (the owner of the other penthouse) and "others" which would protect the Corporation from future problems associated with the proposed common property alterations, in actual fact this exercise would likely require an inordinate amount of time and effort to negotiate, and furthermore such an effort would be completely disproportionate to the time available and could have a displacing effect on much of the Board's regular workload with possible detriment to the latter through shear (sic) neglect".

[6] The board member went on to note that "the proposed alterations to PH 1 [the other penthouse] may just be a forerunner to other things to come. PH 2 (which is now the Langager unit) may be sold and the new owners may want to renovate their unit. So where does this all end? And how do we cope with this?" This letter was prescient.

[7] It appears that no agreement was ever entered into with the prior owners of the Langager unit to ensure the costs associated with the use of the common property roof area for a deck were assumed by the owner. In 2001 the board asked Ms. Langager for a letter confirming her understanding that the area immediately surrounding her penthouse was common property and that any railings, posts and decking will have to be removed at her expense when repairs to the roof were required. She responded and confirmed that "the area immediately surrounding

penthouse 2, excluding the southeast patio area, is common area and that any railings, posts and decking will have to be removed at my expense when repairs to the roof are required." Ms. Langager then paid for the installation of a new guardrail and posts around the extended deck area.

[8] The issue of the owner's responsibility for the exclusive use of common property came up again when the obligations of condominium boards came to the fore in two Alberta cases that were ultimately decided by the Court of Appeal: ***Francis v. Condominium Plan No. 8222909*** 2003 ABCA 234 and ***The Owners: Condominium Plan No. 992 5205 v. Carrington Developments Ltd.*** 2004 ABCA 243. As a result of this litigaton the Condominium Corporation became more alert to its duties and obligations and wrote to Ms. Langager providing an agreement for execution in relation to the use of the extended deck area. A revised agreement was provided in 2006 and in early 2007 Ms. Langager provided a further revised agreement to the Board, approximately a week before the deadline set by the Board for her execution of the agreement. The Board did not respond. An impasse had apparently been reached between the parties and in late March, 2007, Ms. Langager commenced these proceedings. She filed an originating notice of motion seeking an order that the condominium corporation's conduct had been improper with respect to good faith negotiations with her in coming to an agreement respecting her continued use of the wrap-around deck and patio area surrounding the exterior of her condominium unit. She alleged that the corporation has been unfairly prejudicial in attempting to extract an unfair indemnity agreement from her, an agreement that was not being asked of all other unit holders of the corporation.

[9] The relief Ms. Langager seeks is that the corporation be required to enter into an exclusive use and indemnity agreement permitting her to continue using the wrap-around deck and patio area; and advice and direction respecting fair and equitable terms for that agreement.

[10] I pause here to note that counsel advised me that at the end of June, subsequent to the filing of the materials in this action, the Board passed a motion that in essence, closed the door on the continued operation of the extended area of the deck. There is no issue between the parties that Ms. Langager is entitled to use the patio that has always been available to her unit.

[11] The role of the condominium corporation in light of the provisions of the *Condominium Property Act* has been delineated by the Alberta courts. In ***The Owners: Condominium Plan No. 992 5205 v. Carrington Developments Ltd.*** noted earlier, the court held that a condominium corporation is unlike a business corporation which enjoys the natural person powers provided by Alberta's *Business Corporations Act*. A condominium corporation can operate only within the powers granted by the Act.

[12] In ***Francis v. Condominium Plan No. 8222909*** , previously noted, at paragraph 32, the court found that the scheme of the Act does not permit a court to impose what it considers to be fair on a case-by-case basis. The Act is designed to provide certainty to both owners and corporations. It achieves fairness in that way. The court found that an act of the corporation that is outside the statute is ultra vires and an ultra vires act is an illegal act even if it is acted on over

the course of time or on separate occasions. The court pointed to the example of ***York Corporation v. Harbour Square***, where a condominium corporation wrongly permitted the unauthorized use of common property over four years, and then retracted its authorization. The court in that case rejected a defence on the basis of estoppel on the grounds that estoppel is not effective against a statutory duty or obligation.

[13] With this legal and factual backdrop I turn to the issues at hand. I will preface my remarks by saying that with a dispute of this nature, every effort should be made by the parties to settle their differences. Ms. Langager was on the board of this condominium from 2002 to 2006. It is clear from the materials filed that she entertains other owners and board members to dinner in her home. She apparently plans to continue living in the building, and I assume that this litigation must make meetings in the elevators, and the usual social occasions that arise from being close neighbours, awkward. However, for whatever reasons the parties have not settled this matter and it has come to me for resolution or referral to trial.

[14] The first question is Ms. Langager's right to the extended deck area. She points to its inclusion in the advertising she relied on when purchasing the unit, its use by the prior owners, the fact it is only accessible from her unit and her ongoing use of this area. Her argument is based in estoppel.

[15] The Act generally permits the transfer or lease of common property in section 49. Section 50 permits a lease to be given to an owner permitting the owner to exercise exclusive possession in respect of an area of the common property. However, for a lease to be effective, it must be approved in writing and executed by the corporation and delineated in the condominium plan as set out in section 49 of the Act. It is acknowledged by the parties that none of this occurred in this case and, as the Alberta Court of Appeal made clear in ***Carrington***, paragraph 17, a condominium corporation cannot exceed the authorization granted in the Act.

[16] Counsel advised that to sidestep the requirements of s. 50 of the Act, the practice of condominium boards has been to give revokable licences. Section 10(f) of the By-laws provides that the corporation may grant an owner the right to exclusive use and enjoyment of common property and any grant is determinable on reasonable notice unless the corporation by unanimous resolution resolves otherwise. Bylaw 70 provides that, subject to by-law 10(f) the owner of each unit shall have the right to the exclusive use and enjoyment of such portions of the common property as may be designated by the corporation. The condominium by-laws are binding on Ms. Langager. See: ***Condominium Plan No. 9524710 v. Webb*** [1999] 32 RPR (3d) p. 185. The bylaws were in place when she purchased the unit. At its best, the nature of any interest that Ms. Langager can claim to the extended deck area is a revokable licence and counsel acknowledged this. It is an interest that the Board has the right to revoke.

[17] The condominium corporation was prepared to allow Ms. Langager to use the extended deck area exclusively for her unit, but required the execution of an indemnity agreement. She would not sign the agreement provided. Ms. Langager seeks her requested relief pursuant to s. 67

of the Act on the basis that the corporation, through its board, has conducted itself in a manner that is oppressive or unfairly prejudicial or unfairly disregards her interests.

[18] The specific conduct that she alleges meets the test is the indemnity provision in the 2002 and, more importantly, in the 2006 versions of the proffered indemnity agreement. She says that those agreements required of her indemnities that are not required of the 78 owners on lower floors. The 2006 agreement, she says, does not differentiate between the pre-existing patio and the extended deck area. As a result, it requires her to provide an indemnity in relation to the patio and no other owner with a balcony has to do so. Their balconies are maintained as part of the common property. The agreement that she provided, she says, makes this distinction clear and only requires her to be responsible for the extended deck area. By failing to accept and sign that agreement, she says, the Board conducted itself in a way that was oppressive or unfairly prejudicial or unfairly disregarded her interests. She sayss that she has not been treated fairly by the Board; they have not acted with an even hand. This conduct, she says, meets the test for oppression and should lead to the relief she is seeking.

[19] The courts have defined oppressive conduct by condominium corporations as conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith. “Unfairly prejudicial conduct” has been interpreted to mean conduct that is unjust and inequitable, that is a mistreatment, injury, excessively severe or hard to bear. See: ***Gentis v. Strata Plan VR 368*** [2002] 8 RPR (4th) 27 quoting from ***Strata Plan VR1767 v. Seven Estate Ltd*** (2002) 49 RPR (3d) 156 at para.47 and ***Niedermeier v. York Condominium Corporation No. 50*** (unreported) Ont. S.C., 2006-06-23, No. O5-CV-293902PD3, paragraph 31. In ***Gentis***, at para. 28, when considering the meaning of “significant unfairness” the court said that the Corporation had a duty to act in the best interests of all owners and at times that can be in conflict with the interests of a single owner. The court said that it should only interfere with the use of the corporation’s discretion if it is exercised in a fashion that “transcends beyond mere prejudice or trifling unfairness”.

[20] Relying on ***Peoples Department Stores Inc. (Trustee of) v. Wise*** 2004 SCC 68, the Board argues that I must accord deference to its decisions. I should not take an objective perspective to determine if the conduct of the Board is reasonable, but must take a subjective view of the circumstances when deciding whether the Board has acted in an oppressive or unfairly prejudicial fashion. The Alberta courts, it says, has limited the requirements for Board members, recognizing that they are normally made up of volunteer owners in the complex: Section 28 of the Act requires that they must exercise their powers and discharge their duties honestly and in good faith and not vote where in a conflict of interest. If they act in a way that is oppressive, unfairly prejudicial or unfairly disregards the interests of an interested party, relief can be sought under s. 67.

[21] I have sympathy for Ms. Langager’s situation. It appears she was misled, although not by the Board. However, sympathy is not the test under s. 67 of the Act, and whether I look at the matter objectively, or subjectively, give deference to the Board’s decision or not, I cannot find that the conduct of the Board meets the legal test for improper conduct as described in s. 67.

[22] Ms. Langager does not deny that she should be responsible for the costs associated with her use of the extended deck area. She would be foolish to do so in the face of the provisions of the Act and the by-laws. For eg, section 50(2) of the Act, bylaw 9(i) bylaw 10(f). and bylaw 10(g). There is nothing unreasonable in the condominium corporation asking that she be held responsible and indemnify the corporation if her improvements to, and use of, the extended deck area result in any loss to the corporation. There was no request that she pay any fee for the use of the area. The Board sought to ensure the corporation, and therefore the owners, would not and could not be responsible for any loss of any kind tied to her exclusive use of the common property; and in so doing they were acting as a responsible Board.

[23] To consider Ms. Langager's argument the correspondence and agreements need to be examined. In 2002 the Board wrote to Ms. Langager and stated: "Recall that no one involved in your purchase or sale informed you that the Condominium Corporation is responsible only for the patio area as indicted on the Condominium Plan. Continued use of the deck area beyond those boundaries is entirely at the discretion of the Condominium Corporation. In order to avoid the situation in which you found yourself, the Board of Directors has decided that formal contracts need to be drawn up between the Condominium Corporation and the penthouse owners with respect to the exclusive use of the roof area not designated on the Condominium Plan as patio [emphasis added]. The letter then refers to the attached contract which is to "set out the terms on which each penthouse owner can reasonably expect to continue to enjoy exclusive use of the roof area extending beyond the area marked out as patio on the condominium plan...and to assure the condominium corporation that each penthouse owner will take full responsibility for all improvements made on the roof area outside that designated as patio on the condominium plan" [emphasis added]. The letter concludes by saying that the Board looks forward to hearing from her at her earliest convenience.

[24] The attached indemnity agreement clearly distinguishes in the preamble between the "original corner deck area" and the "extended deck area" and says that the parties wish to record the terms on which the unit owner may continue to use the "extended deck area". The agreement then discusses construction and maintenance issues in relation to the extended deck area.

[25] The indemnity clause says:

> "The Unit Owner acknowledges that there are inherent risks associated with use and occupancy of the Extended Deck Area, and that users of the Extended Deck Area could sustain grievous personal injury if (among other things) any railing of fencing installed in the deck area should for any reason be inadequate or fail. The Unit Owner shall use the deck area [emphasis added] entirely at her own risk. The Unit Owner agrees....[words omitted] that neither the Unit Owner nor the Invitees will hold the Corporation or the Board responsible ...[words omitted] for... damage...[words omitted] arising out of or in connection with the use or occupancy of the Extended Deck Area. ..[emphasis added]

[26] In 2002 Ms. Langager joined the Board and nothing further happened in relation to the execution of this agreement. She left the Board in 2006 and later that year she was asked once again to sign a similar agreement. The next agreement defined the common property patio and the "Extended Area" where the owner had installed decking and railing. It noted in the preamble that "the Unit Owner acknowledges that she has no property interest in the Extended Area and should interpretation of this agreement be required, the guiding principle is that Unit Owner's continued use of the Extended Area must not cause the Corporation (i) any expense whatsoever, or (ii) inconvenience or difficulty in maintaining the roof or building envelope" [emphasis added]. The agreement then sets out in paragraphs 6 and 7 the indemnity provisions which are extensive and include a phrase that the owner and the invitees would not hold the Corporation or Board responsible for injuries "arising out of or in connection with the use or occupancy of the deck area" [emphasis added]. It is the use of the words " deck area" that Ms. Langager says amounts to improper conduct. She argues that it includes the requirement for an indemnity that is not limited to the extended deck area only, but includes her patio area. No similar indemnity, she says, is required from other owners for their balconies. This, she alleges, is unfair.

[27] Ms. Langager did not sign the revised agreement either, and sent back a further revised agreement to the Board's counsel on February 21, 2007. The letter accompanying her revised agreement did not bring this alleged prejudicial wording to the attention of the Board's counsel. Instead, it truncated the original agreement significantly and reduced the indemnity clause to a single sentence: "Further the Unit Owner agrees that no such approval [for deck, rail, fencing or other improvements on the extended area] shall in any way impose upon the Corporation or the Board, nor shall the Corporation or the Board have, any liability or responsibility for or in connection with the improvements." This indemnity clause is simplistic compared to what was being sought by the Board.

[28] All of the correspondence and documentation indicates a clear understanding by both parties that the indemnity and responsibility of Ms. Langager would be for the extended deck area. I cannot see how she can now argue that this small inconsistency in wording amounts to conduct of the Board that was unfairly prejudicial to her, or oppressive or unfairly disregarded her interests. If she thought it important, she merely had to point out to the Board the need for a small clarification of the wording in the indemnity clause and she did not do so. Instead she made significant changes to the agreement and watered down the indemnity clause to something almost unrecognizable. She, a former board member, seems to be giving short shrift to the obligations on the Board to enforce its by-laws and keep the common property in a proper state of repair: See ***Condominium Plan No. 9524710 v. Webb*** [1999] 32 RPR (3d) 185 at para. 18 and 36 and ***Mattias v. Strata Plan VR 2135*** [2000] BCSC 519, para. 24.

[29] Ms. Langager points out that the use of the extended deck area adds considerably to the value of her unit. I do not doubt her. However, Ms. Langager seeks all of the benefits of exclusive possession of the common property and does not appear to be acting forthrightly in relation to the assumption of the accompanying burdens.

[30] Ms. Langager relied on a number of cases that she said supported the relief she was seeking. I note that care must be taken in relying on case law under different legislation, and in any event, each of these cases is distinguishable on its facts. For example, in ***Poole v. Strata Plan VR 2506*** 2004 BCSC 1613 the unit holder and the corporation had both believed for 11 years that the roof area was the unit holder's limited common property and the matter only arose when the unitholder exceeded the safe weight limits of the roof and wanted the corporation to re-enforce the structure. In ***Mattias,*** supra, the corporation provided the unitholder with a long term lease for 99 years, which induced her to purchase the unit for a premium price. Eleven years later the parties discovered the lease was void. These cases are not on all fours with the situation before me. If Ms. Langager has a complaint, it may be with the vendor, the realtor, or the lawyer she used to complete her purchase. It is not with the condominium corporation.

[31] The Courts have noted on more than one occasion a special relationship ensues when a purchaser buys a condominium. It was aptly expressed by the District Court of Appeal of Florida and adopted by our court in ***Condominium Plan No. 9524710 v. Webb*** [1999] 32 RPR (3d) 185 at paragraph 20:

> Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others. The benefits of condominium living and ownership demand no less. The individual ought not be permitted to disrupt the integrity of the common scheme through his desire for change, however laudable that change might be.

[32] In summary, the Board's conduct does not meet the test in s. 67. Ms. Langager's use of the extended decking area is of benefit to her, but her dealings with the condominium corporation who sought to have her assume the burdens associated with its use showed little appreciation of the Board's obligation to uphold the bylaws and consider the interests of all of the owners. This application is dismissed. If costs cannot be agreed to, the parties may speak to me within 30 days of this decision.

Heard on the 31st day of July, 2007.
Dated at the City of Edmonton, Alberta this 2nd day of August, 2007.

J. B. Hanebury
M.C.C.Q.B.A.

Appearances:

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Reynolds, Mirth, Richards & Farmer
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