CITATION: McFlow Capital v. Simcoe Condominium Corporation No. 27, 2011 ONSC 475
DIVISIONAL COURT FILE NO.: 11/11
DATE: 2011/01/20

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: McFlow Capital Corp.

AND:

Simcoe Condominium Corporation No. 27 and Kenneth James

BEFORE: Herman J.

COUNSEL: Paul D. Guy, for the applicant, McFlow Capital Corp.

George F. Vella, for the respondent, Simcoe Condominium Corporation No. 27

Ranjan Das, for the respondent, Kenneth James

James F. Diamond, for Pencor Construction Inc.

HEARD: January 19, 2011

ENDORSEMENT

[1] The applicant, McFlow Capital Corp., seeks leave to appeal the order of Himel J., dated November 16, 2010. The motion judge dismissed McFlow's motion to remove and replace the administrator of Simcoe Condominium Corporation No. 27 (the Corporation).

[2] Opposing the granting of leave to appeal are: the Corporation; Mr. Kenneth James, who is the representative of the majority of the unit owners other than McFlow; and Pencor Construction Inc., a lien claimant and judgment creditor of the Corporation.

[3] McFlow acknowledges that the motion judge cited the correct test. However, in its submission, she erred in principle in her application of the test given the scheme and intent of the *Condominium Act*. In particular, the Act is based on the principle of self-government; an administrator should only be appointed as a last resort.

[4] McFlow does not, however, challenge the appointment of an administrator. In fact, it was McFlow that initiated the process to have the current administrator appointed. Rather, McFlow alleges that the current administrator has failed to put the affairs of the Corporation in order. It seeks to replace him with someone else.

[5] The test for the replacement of an administrator is the same as that for the appointment of an administrator. Section 131 (2) of the Act provides that the court may make the order if, in its opinion, "it would be just or convenient, having regard to the scheme and intent of this Act and the best interest of the owners". In reaching its decision, the court should consider whether the administrator has conducted himself "in a reasonable and prudent manner" (*Fortunato v. Atrens* (2007) CarswellOnt 9008 (Ont. Sup. Ct.) at para.7; aff'd [2008] O.J. No. 591 (C.A.)).

[6] The motion judge reviewed the evidence. She summarized as follows:

> Although there is much left to be done by the administrator, it cannot be said that there is substantial mismanagement and that the affairs of the corporation must still be put in order. I am of the view that Vero should be permitted to continue with his mandate. It would not be in the interests of the owners to have fees and expenses duplicated as a result of a new administrator being appointed.
>
> For these reasons, I am of the view that it is not just and convenient to remove and replace the administrator.

[7] McFlow put forward three bases for calling into question the motion judge's order. The first reason is that her conclusion that "it cannot be said…that the affairs of the corporation must still be put in order" could not be sustained by the evidence.

[8] The parties have very different views of the evidence. McFlow is, in essence, asking me to reevaluate that evidence and come to a different conclusion. The motion judge had the evidence before her. She assessed the evidence and concluded that the replacement of the administrator would not be in the best interests of the owners. There was ample evidence before the motion judge to enable her to reach the conclusion that she did.

[9] The second basis put forward by McFlow is that the motion judge incorrectly relied on the duplication of fees should a replacement administrator be appointed. In McFlow's submission, the administrator could be replaced and still be ordered to report to the court and pass his accounts. However, it stands to reason that there would be duplication. A new administrator would have to spend significant time familiarizing himself with the history of what had occurred. At the same time, the prior administrator would have to prepare reports on what had transpired during his administration.

[10] Finally, McFlow submits that the motion judge's order that the administrator report to the court and pass accounts within two years after its appointment (that is, by May 27, 2011) and every two years thereafter, showed a clear misunderstanding of the remedy of an administrator. Mc Flow contends that the order conflicts with the principles that the time that an administrator is in place should be as short as possible and an administrator should report to stakeholders and the court at regular and frequent intervals.

[11] However, none of the parties, including McFlow, requested an order specifying the administrator's reporting obligations. It was the motion judge who thought it was in the best interests of the owners to do so. Furthermore, the motion judge provided that if any of the

parties were of the view that the reports should be more frequent or sooner, they could bring the matter back to court.

[12] McFlow seeks leave to appeal on the basis that there is "good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that…leave to appeal should be granted" (Rule 62.02 (4) (b)).

[13] McFlow has not established that there is good reason to doubt the correctness of the order. The motion judge considered the evidence and applied the correct test. McFlow disagrees with the motion judge's assessment of the evidence. However, that is not a basis upon which to doubt the correctness of her decision.

[14] Furthermore, this is not a matter that transcends the interests of the parties. The conclusions the motion judge reached are fact-specific. Therefore, even if there had been reason to doubt the correctness of the order, the appeal would not involve matters of such importance that would warrant granting leave to appeal.

[15] The motion for leave to appeal is therefore dismissed.

[16] The respondents and Pencor seek costs on a partial indemnity basis. Taking into consideration the various factors set out in Rule 57.01, the parties' submissions and their respective costs outlines, costs are to be paid by the applicant as follows: $3,500, inclusive, to the Corporation; $3,500, inclusive, to James; and $1,500, inclusive, to Pencor. The costs are payable within 30 days of this order.

Herman J.

Date: January 20, 2011