

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: 2011 SKQB 219

Date: 2011 06 02
Docket: Q.B.G. No. 1500/2010
Judicial Centre: Saskatoon

BETWEEN:

DENNIS TOFIN,

Applicant

- and -

SPADINA CONDOMINIUM CORPORATION,

Respondent Corporation

- and -

TONY BORYSKI, MAURICE DUVAL, BENJAMIN
GOLDSTEIN, ELAINE MALKIN, TOM McCLOCKLIN, JR.,
TOM McCLOCKLIN, SR., SANDY REES,

Respondent Directors

- and -

REMBRANDT HOLDINGS LTD., and COMMERCE
HOLDINGS LIMITED,

Respondent Commercial Owners

Counsel:

Gary A. Meschishnick, Q.C.
M. Kim Anderson
Naheed Bardai

for the applicant
for the respondent corporation
for the respondent commercial owners

DECISION
June 2, 2011

DOVELL J.

[1] The applicant, Dennis Tofin (“Tofin”), a residential unit owner at Spadina

Condominium Corporation (the “Condominium Corporation”), has brought this application against the Condominium Corporation, its board of directors (the “Board”) and the owners of three commercial units seeking relief pursuant to Rule 664 of *The Queen’s Bench Rules*. The applicant, in particular, is asking the Court for a declaration interpreting the bylaws of the Condominium Corporation with regard to the election of the members of the Board with a view to determining the voting rights of the commercial owners.

[2] Preliminary objections were made pursuant to Rule 319 of *The Queen’s Bench Rules* by the Condominium Corporation and the commercial owners with regard to the content of the applicant’s affidavit material filed in support of his application. The preliminary decision of the Court clarifying what the Court would disregard within the affidavits filed by the applicant was provided to the parties prior to the argument of the merits of the application on May 18, 2011.

[3] In addition to the vetted affidavit materials filed by the parties, an agreed statement of facts was filed by the parties.

A. Background Facts

[4] Spadina Condominium is a 32-unit condominium. The three largest units in the condominium are commercial units while the remaining twenty-nine units are residential units. The unit factors of all of the owners were shown in Exhibit “A” to the agreed statement of facts. The commercial units are apportioned 4,431 unit factors of the total 10,000 unit factors in the condominium, and the residential units are apportioned 5,569 unit factors.

[5] Accordingly, the commercial owners hold 44.31 percent of the total votes, and the residential unit owners hold 55.69 percent of the total votes.

[6] The present commercial owners, Rembrandt Holdings Ltd. and Commerce Holdings Limited, purchased the commercial units at the condominium in approximately September 2006 from the applicant, Dennis Tofin.

[7] All of the condominium units and common property are controlled, managed and administered by the Spadina Condominium Corporation, a body corporate continued pursuant to the provisions of *The Condominium Property Act, 1993*, S.S. 1993, c. C-26.1 (the "Act"). The bylaws of the Condominium Corporation, attached as Exhibit "B" to the agreed statement of facts, were unanimously passed on December 29, 1998, and registered in accordance with the Act on January 16, 1999. Pursuant to the provisions of s. 39 of the Act, the powers of the Condominium Corporation are to be exercised and the duties of the Condominium Corporation are to be performed by the Board.

[8] At all material times, the Board has consisted of seven persons. Up to and including October 9, 2009, the Board consisted of Peter Dielschneider, Maurice Duval, Betty Orchard, Eleanor Williams, Tom McClocklin Jr., Tony Boryski and Dennis Tofin.

[9] An issue arose with respect to the interpretation of Section 3.3 and Article 7 of Bylaw No. 1 governing the election of members of the Board.

[10] The commercial owners' interpretation of the bylaw was that:

- (a) The commercial owners were and are entitled to nominate up to three persons for election to the Board;
- (b) All owners, residential and commercial, are entitled to vote on all nominees to the Board;
- (c) All owners have agreed to cast their votes so as to elect the

commercial owners' nominees and, where the owners neglect or refuse to cast their votes in such manner, the commercial owners may vote separately as a class to elect their nominees; and

- (d) There is no restriction in the bylaw limiting the right of the commercial owners to vote on positions to the Board.

[11] The applicant's interpretation of the bylaw was that the commercial owners were entitled to nominate up to three persons for election to the Board and to exercise their right to see them elected but were not entitled to vote on the election of the remaining four positions on the Board.

[12] A general meeting of the owners of the Condominium Corporation was to be held to elect a new Board on October 9, 2009. In advance of the meeting, the commercial owners obtained a legal opinion as to the interpretation of the voting provisions of the bylaws. That opinion of Naheed Bardai of MacPherson, Leslie & Tyerman was attached as Exhibit "C" to the agreed statement of facts. The opinion of Naheed Bardai was provided to the Board in advance of the meeting as was the legal opinion of William J. Shaw of McDougall Gauley. The applicant, on the instructions of the Board, had obtained the legal opinion of William J. Shaw as to the interpretation of the voting provisions of the bylaws. The opinion of William J. Shaw was attached as Exhibit "D" to the agreed statement of facts.

[13] During the meeting held on October 9, 2009, there was a discussion as to the voting rights of the commercial owners.

[14] The following individuals were nominated at the meeting:

- (a) Tony Boryski;
- (b) Maurice Duval;

- (c) Benjamin Goldstein;
- (d) Elaine Malkin;
- (e) Tom McClocklin Sr.;
- (f) Tom McClocklin Jr.;
- (g) Betty Orchard;
- (h) Sandy Rees (also referred to in affidavit material as “Reese”); and
- (i) Dennis Tofin.

[15] As there were only seven positions on the Board, a vote was required. The vote was carried out by way of a polled vote, and each owner was allowed to vote their unit factors for each of the seven positions on the Board. The commercial owners did not use their special rights as set out in Sections 3.3(c) and 3.3(e) of Bylaw No. 1 at the meeting. Nor did the commercial owners vote their unit factors as a separate class to elect any nominees at the meeting.

[16] The following individuals (the respondent directors) were elected to the Board as a result of the vote:

- (a) Tony Boryski, resident owner;
- (b) Maurice Duval, resident owner;
- (c) Benjamin Goldstein, resident owner;
- (d) Elaine Malkin, resident owner;
- (e) Tom McClocklin Jr., commercial owner;
- (f) Tom McClocklin Sr., commercial owner; and
- (g) Sandy Rees, commercial owner representative.

[17] The minutes of the October 9, 2009, meeting were attached as Exhibit “E” to the agreed statement of facts.

[18] The majority of the Board are of the view that the proper interpretation of the provisions governing the election of directors was:

- (a) The commercial owners were and are entitled to nominate up to three persons for election to the Board;
- (b) All owners, residential and commercial, were entitled to vote on all nominees to the Board;
- (c) All owners have agreed to cast their votes so as to elect the commercial owners' nominees and, where the owners neglect or refuse to cast their votes in such manner, the commercial owners may vote separately as a class to elect their nominees; and
- (d) There is no restriction in the bylaw limiting the right of the commercial owners to vote on positions to the Board.

[19] In preparation for this application, the present chairman of the Board, Benjamin Goldstein, called a meeting of the Board on April 27, 2011, at which time the chairman asked for the opinions of the board members respecting the interpretation of the bylaw and a vote was taken with regard to the Board's current interpretation of the bylaw.

[20] A vote was taken at the meeting of the Board, and a resolution was passed by a majority of 3 to 1. None of the three commercial unit directors, Tom McClocklin Sr., Tom McClocklin Jr. or Sandy Rees, took part in the discussion or voted during the meeting.

[21] By resolution, the Board of the Condominium Corporation determined that the following interpretation is, has been and continues to be the Board's interpretation of the bylaws:

That the Board of Directors hereby confirms that since October 9, 2009 it has been, and that it continues to be the opinion of the Board that the following is the proper interpretation of Section 3.3 of the Bylaws of the Corporation, where the Board is to consist, as it does now, of seven members:

- (a) The Commercial Owners are entitled to nominate up to 3 persons for election to the Board;
- (b) All owners, residential and commercial, are entitled to vote on all nominees to the Board;
- (c) All owners have agreed to cast their votes so as to elect the Commercial Owners' nominees and where the owners neglect or refuse to cast their votes in such manner, the Commercial Owners may vote separately as a class to elect their nominees; and
- (d) There is no restriction in the Bylaw limiting the right of the Commercial Owners to vote on positions to the Board.

B. Relevant sections of Bylaw No. 1 of Spadina Condominium Corporation

[22] The relevant sections of Bylaw No. 1 are:

ARTICLE THREE BOARD MEMBERS

...

Section 3.3 Election and Term

- a) The unit owners may elect the board members to hold office for a term expiring not later than the close of the third annual meeting of the unit owners following the election. It is not necessary that all board members elected at a meeting of unit owners hold office for the same term. A board member not elected for an expressly stated term ceases to hold office at the close of the first annual meeting of unit owners following his or her election. All board members retiring at any given election may stand for re-election.
- b) If an election of board members is not held at the proper time, the incumbent board members shall continue in office until their successors are elected.
- c) Where the Board is to consist of three or four persons, the Commercial Owner may nominate one (and no more than one) nominee to the Board. Where the Board is to consist of five or six

persons, the Commercial Owner may nominate up to (and no more than) two nominees to the Board. Where the Board consists of seven persons, the Commercial Owner may nominate up to (and no more than) three nominees to the Board.

- d) Where the terms of the Board members are staggered, such that not all of the positions on the Board are up for re-election, section 3.3(c) shall be read subject to the provision that the Commercial Owner shall only [be] permitted to nominate such number of directors (if any) as will result in the representation set out in section 3.3(c).
- e) Subject to section 3.3(d), where the Commercial Owner has nominated someone to the Board pursuant to section 3.3(c), the unit owners shall cast their votes so as to elect such nominees to the Board. Where the unit owners neglect or refuse to so cast their votes, the Commercial Owner shall be entitled to vote separately as a class to elect its nominee(s).

...

ARTICLE SEVEN MEETINGS OF UNIT OWNERS

...

Section 7.2 General Meetings

- a) All meetings of unit owners other than annual meetings shall be called general meetings. The board may, whenever it thinks fit, convene a general meeting.
- b) The board, on the written request of owners or their designates entitled to vote who represent not less than 25% of the total unit factors for the units, shall convene a general meeting no later than 45 days after the request is received by any member of the Board.

...

Section 7.4 List of Unit Owners Entitled to Notice

For every meeting of unit owners, the Corporation shall prepare a list of unit owners, or first mortgagees and other persons entitled to vote at the meeting, showing the number of unit factors each such unit owner, first mortgagee, or such other person [is] entitled to vote. The unit owners, first mortgagees and other persons listed shall be those shown on the property register at the close of business on the day immediately preceding the day on which notice of the meeting is given. The list shall be available for examination by any unit owner during reasonable hours at the condominium premises.

...

Section 7.7 Quorum

A quorum for the transaction of business at any meeting of unit owners shall be those persons representing a majority of the unit factors held by those persons entitled to vote, present in person or by proxy, provided that at least 50% of the unit factors so represented must be unit factors held by Residential Owners, and 50% of the unit factors so represented must be unit factors held by the Commercial Owner.

Section 7.8 Right to Vote

Subject to the provisions of this paragraph, and of paragraph 7.9 as to the authorized representatives of any body corporate and paragraph 7.12 as to joint owners, at any meeting of unit owners in respect of which the Corporation has prepared the list referred to in paragraph 7.4, every person who is named in such list shall be entitled to vote the unit factors shown thereon opposite his or her name. In the absence of such list, every person shall be entitled to vote at the meeting who at the time is entered in the unit register as the owner, first mortgagee or other person entitled to vote with respect to one or more units.

...

Section 7.14 Votes to Govern

At any meeting of unit owners, every question shall, unless otherwise required by the Act or these bylaws, be determined by the majority of the votes cast on the question. In the case of an equality of votes, either upon a show of hands or upon a polled vote, the chairman of the meeting shall not be entitled to a second or casting vote, and the motion shall be deemed to have been defeated.

Section 7.15 Show of Hands

Subject to the provisions of these bylaws, any question at a meeting of unit owners shall be decided by a show of hands unless a polled vote on the question is required or demanded as set out below. Upon a show of hands, every person who is present and entitled to vote (except as may be restricted by paragraphs 7.12 and 7.13), shall have one vote, regardless of the number of unit or unit factors he or she may own or represent. Whenever a vote by show of hands has been taken, a declaration by the chairman of the meeting that the vote upon the question has been carried by a particular majority or not carried, and an entry to that effect in the minutes of the meeting shall be prima facie evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against any resolution or other proceeding in respect of the said question, and the result of the vote so taken shall be the decision of the unit owners upon the question.

Section 7.16 Polled Votes

On any question proposed for consideration at a meeting of unit owners, and whether or not a show of hands has already been taken, any unit owner, first mortgagee, proxyholder or other person entitled to vote at the meeting may require and demand a polled vote. A polled vote so required shall be taken in such manner as the chairman shall direct. A request for a polled vote may be withdrawn at any time prior to the taking of the polled vote. If a polled vote is taken, each person present in person or by proxy and entitled to vote shall be entitled to the number of votes as corresponds to the unit factors for his unit or units, subject to the limitation as set forth in paragraphs 7.12 and 7.13. The result of the ballot so taken shall be the decision of the unit owners upon such question.

[Emphasis added]

C. Relevant provisions of *The Condominium Property Act, 1993*

[23] The relevant provisions of *The Condominium Property Act, 1993, supra*, are:

Duties

35(1) A corporation is responsible for the enforcement of its bylaws and the control, management and administration of the units, and of the common property and common facilities.

...

Board of Directors

37(1) A corporation is to have a board of directors that is constituted in accordance with the bylaws of the corporation.

...

Duties of Board

39(1) Subject to any restriction imposed or direction given at a general meeting, a board shall exercise the powers and perform the duties of the corporation.

...

Voting Rights of Owners

41(1) Subject to subsections (2) and (5) to (12), each owner has a number of votes that bears the same proportion to the total number of votes as the owner's unit factor bears to the total of the unit factors.

(2) Subject to the right of any owner to ask for a vote by unit factors in person or by proxy, the bylaws of a corporation may provide for

voting by show of hands for specified purposes.

(3) Unless otherwise provided for in this Act, all questions proposed for the consideration of the owners at a meeting of owners shall be determined by a majority of the votes cast.

...

Bylaws generally

44 ...

...

(3) The bylaws of a corporation bind the corporation and the owners to the same extent as if the bylaws:

(a) had been signed and sealed by the corporation and by each owner; and

(b) contained covenants on the part of each owner with every other owner and with the corporation to observe, perform and be bound by all the provisions of the bylaws.

...

Subject matter of bylaws

47(1) Subject to the regulations, a corporation may pass bylaws:

(a) governing the number, qualifications, nomination, election, remuneration, term of office and filling of vacancies of member of the board;

...

(2) No bylaw shall be passed pursuant to subsection (1) that is contrary to this Act or the condominium plan.

[Emphasis added]

D. Analysis

1. Standard of Review

[24] The applicant has brought this application pursuant to Rule 664 of *The Queen's Bench Rules*. He seeks an order in the nature of a declaration.

[25] As stated by this Court in *Anderson v. Owners: Condominium Plan 99SA34021*, 2010 SKQB 53, 352 Sask. R. 106, in order to succeed on an application such as this one, the applicant must point to a clear public or statutory duty on the part of the

Condominium Corporation. As was determined in *Anderson*, a condominium corporation does not meet the definition of a body which owes a public duty. However, in certain circumstances, a condominium corporation owes a statutory duty.

[26] Section 35(1) of *The Condominium Property Act, 1993*, provides:

35(1) A corporation is responsible for the enforcement of its bylaws and the control, management and administration of the units, and of the common property and common facilities.

[27] A condominium corporation is mandated by s. 35(1) of the Act to interpret and enforce its bylaws. In this case the Condominium Corporation, or more particularly its Board, has interpreted Section 3.3 of Bylaw No. 1 as follows:

That the Board of Directors hereby confirms that since October 9, 2009 it has been, and that it continues to be the opinion of the Board that the following is the proper interpretation of Section 3.3 of the Bylaws of the Corporation, where the Board is to consist, as it does now, of seven members:

- (a) The Commercial Owners are entitled to nominate up to 3 persons for election to the Board;
- (b) All owners, residential and commercial, are entitled to vote on all nominees to the Board;
- (c) All owners have agreed to cast their votes so as to elect the Commercial Owners' nominees and where the owners neglect or refuse to cast their votes in such manner, the Commercial Owners may vote separately as a class to elect their nominees; and
- (d) There is no restriction in the Bylaw limiting the right of the Commercial Owners to vote on positions to the Board.

[28] Although the applicant argued that the appropriate standard of review is correctness, the Court is not prepared to accept that proposition. The appropriate standard of review is reasonableness.

[29] In *Anderson, supra*, our Court considered the standard of review to be

applied when faced with an application for judicial review of a condominium board's decision. Although in that case the Court concluded that judicial review did not apply to discretionary decisions of a condominium board, it concluded that in a situation where judicial review did apply, such as a statutory duty situation, the standard of review was reasonableness. At paragraphs 32 and 33, Goldenberg J. held:

[32] If judicial review has application, then the standard of review is "what is reasonable [for the condominium association] in carrying out its statutory duty": *Buskell v. Linden Real Estate Services Inc.*, 2003 MBQB 211, [2004] 4 W.W.R. 366, at para. 19; *Baliwalla v. York Condominium Corp. No. 438*, [2007] O.J. No. 1673, at para. 15; and *Devlin v. Condominium Plan No. 9612647*, 2002 ABQB 358, 318 A.R. 386, at para. 3.

And additionally:

[33] A court ought not lightly to interfere in the decisions of a democratically elected board of directors acting within its jurisdiction. *Desjardins v. Winnipeg Condominium Corp. No. 75*, [1991] 2 W.W.R. 193 (Man. Q.B.), at para. 6. The court should defer to duly elected condominium boards, and only if the court is satisfied of improper conduct should they direct and/or grant any remedies. *934859 Alberta Inc. v. Condominium Corporation No. 0312180*, 2007 ABQB 640, 434 A.R. 41, at paras. 54-55.

[30] As held in the *Anderson* decision, *supra*, due deference should be given to the Board with regard to its interpretation of the bylaw.

[31] As outlined above, it is established law that when it comes to such an interpretation, the Board's decision is entitled to deference. In *Devlin v. Condominium Plan No. 9612647*, 2002 ABQB 358, the Alberta Court of Queen's Bench held at paragraph 3:

[3] Bylaws are in place for a good reason and should be enforced, and a message will be sent by the Court that where the Board acts reasonably in carrying out its duty to enforce the bylaws and restrictive

covenants, the Board will be supported by the Court, however, when the bylaw and restrictive covenant are clearly prohibited under the *Condominium Property Act* then the Court will intervene.

[32] As well, the Ontario Court of Appeal stated in *London Condominium Corp. No. 13 v. Awaraji*, 2007 ONCA 154, 221 O.A.C. 240, with regard to the deference to be paid to condominium boards when it came to the enforcement of a condominium's bylaws, at paragraph 6:

[6] ... we consider that it is for the Condominium Corporation to interpret its Declaration and Bylaws and that so long as its interpretation is not unreasonable, the court should not interfere.

[33] The Court has concluded that the interpretation of Section 3.3 of Bylaw No. 1 as adopted by the board of directors of the Spadina Condominium Corporation is reasonable and consistent with the language of the bylaws.

2. Interpretation principles

[34] The wording of Section 3.3 of Bylaw No. 1 is clear, plain and unambiguous.

[35] The applicant is asking the Court to interpret Section 3.3 of Bylaw No. 1 in such a way that the commercial owners would only be permitted to vote for their own nominees and would be barred from voting for or against anyone nominated by the residential owners. There is no specific provision in the bylaws that would allow such an interpretation resulting in such a restriction on the commercial owners' voting rights.

[36] In addition, within the bylaws of a condominium corporation, the owners of the condominium units are able to agree upon how they will cast their votes but to prohibit an owner from voting altogether would be contrary to the voting rights as set out in s. 41 of the Act.

[37] Section 41 of *The Condominium Property Act, 1993*, provides:

41(1) Subject to subsections (2) and (5) to (12), each owner has a number of votes that bears the same proportion to the total number of votes as the owner's unit factor bears to the total of the unit factors.

(2) Subject to the right of any owner to ask for a vote by unit factors in person or by proxy, the bylaws of a corporation may provide for voting by show of hands for specified purposes.

(3) Unless otherwise provided for in this Act, all questions proposed for the consideration of the owners at a meeting of owners shall be determined by a majority of the votes cast.

...

[38] Further, s. 47(2) of *The Condominium Property Act, 1993*, provides:

47(2) No bylaw shall be passed pursuant to subsection (1) that is contrary to this Act or the condominium plan.

[39] The Act provides that all owners are to vote on all questions proposed at any meeting. The applicant is asking the Court to interpret Section 3.3 of Bylaw No. 1 in such a way that the commercial owners would not be allowed to cast their vote on the remaining four positions on the Board. Section 3.3 of Bylaw No. 1 does not expressly state that, and the applicant is asking that the Court imply that term within the bylaw. To do so would result in Section 3.3 of Bylaw No. 1 being in contravention of s. 41 of the Act, and that is prohibited by s. 47 of the Act. The Court is not prepared to do so.

[40] There was a great deal of time spent during the argument of this matter on whether or not the Court should consider principles of contract interpretation in determining whether the Board had properly interpreted the bylaw. In considering those principles, the Court could ascertain the intention of the parties at the time the bylaws were enacted and could imply terms to give effect to that intention. The Court has concluded that principles of contract interpretation have no place within the scope of the

within application, being the interpretation of a condominium bylaw. This process is not analogous to the interpretation of a contract. The owners of condominiums within a condominium corporation are not in the same position as the parties to a specific contract.

[41] Although s. 44(3) of the Act makes reference to the bylaws of a corporation binding the corporation and the owners to the same extent as if the bylaws had been signed and sealed by the corporation and by each owner, the resultant relationship is not the same as that of individual parties who had agreed to the terms of the contract. Notwithstanding some of the owners of a condominium corporation not being in agreement with certain provisions of the bylaws, those same owners are bound to comply with all of the provisions of the bylaws eventually enacted by that condominium corporation.

[42] Although as counsel for the applicant argued it was only an Alberta Provincial Court decision, this Court has concluded that it totally endorses the position taken by the Provincial Court of Alberta in *Wilson v. Condominium Corp No. 021 1057*, 2010 ABPC 150. That Court held that when considering whether a Court can imply terms into a condominium bylaw, the Court held at paragraph 23:

23 I was not provided with any authority, nor was I able to locate any, to support the proposition that a trial judge is able to imply terms or provisions into a condominium corporation's by-laws. In my view, principles of contract interpretation dealing with ascertaining the intention of the parties to a contract and implying terms to give effect to that intention have no application to the interpretation of the rights and obligations created by by-laws promulgated under the requirements imposed by legislation. By-laws are not negotiated as between the condominium corporation and unit owners and I [*sic*] my view the court should not be reading provisions into the by-laws at the instance of either of the parties.

[43] As such, this Court is not prepared to consider the arguments of the applicant's counsel with regard to the intent of the applicant at the time the bylaws were

enacted or apply other principles of contract interpretation in determining whether the Board's interpretation of Section 3.3 of Bylaw No. 1 was reasonable.

E. Conclusion

[44] For all of the reasons as outlined in this decision, the application of the applicant is dismissed. The interpretation of the board of directors of the Spadina Condominium Corporation of Section 3.3 of Bylaw No. 1, as confirmed in its resolution of April 27, 2011, is reasonable and one that this Court is not prepared to interfere with.

[45] As indicated to counsel at the time of the application, if the matter of costs cannot be resolved as amongst the parties, leave is given to the parties to argue the matter of costs at a time to be arranged with the Local Registrar.

J.
M.L. Dovell