Court of Queen's Bench of Alberta

Citation: Condominium Corporation No. 0825873 v. 1246153 Alberta Ltd., 2011 ABQB 178

Date: 20110317
Docket: 0903 19893
Registry: Edmonton

Between:

The Owners: Condominium Corporation No. 0825873

Plaintiff
(Defendant by Counterclaim)

- and -

1246153 Alberta Ltd.

Defendant
(Plaintiff by Counterclaim)

Memorandum of Decision
of
W. Breitkreuz, Master in Chambers

---

[1] On November 18, 2010, I issued Reasons for Decision in a summary judgment application: **Condominium Corporation No. 0825873 v. 1246153 Alberta Ltd.**, 2010 ABQB 718.

[2] Subsequent to the release of those reasons counsel for the defendant challenged my jurisdiction to grant condominium fee arrears which have accrued since the issuing of the statement of claim on December 16, 2009.

[3] The respondent in that application is now the applicant in this application to vary my judgment to delete the amount of the arrears post December 16, 2009. Briefs were presented on this application and I heard oral argument as well.

[4] I reviewed the briefs and the argument of the prior application and the briefs and argument on this application and am satisfied from the cases presented that I have the discretion to grant Mr. Cotter's application or to refuse it. In fact, the cases go both ways, but the rules appear to favour the respondent.

[5] Rule 1.2(1) reads as follows:

> The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

[6] Rule 9.9 reads as follows:

> The Court must determine damages for a continuing claim to the time the Court makes its determination of the amount.

[7] I am aware that the plaintiff's claim for condominium arrears is not a damage claim but I think it would be unreasonable to interpret the rule as being restricted to a damage claim. In fact, I believe as between a liquidated claim and a damage claim, the damage claim is a *major numerus in continet minorem* claim. The quantification of a liquidated claim is almost by definition always far simpler than a damage claim.

[8] In discussing what constitutes a continuing case of action Fradsham, Alberta Rules of Court Annotated, cites ***Hole v. Chard Union***, [1894] 1 Ch. 293 at 295 as follows:

> What is a continuing cause of action? Speaking accurately, there is no such thing; but what is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought. In my opinion, that is a continuing cause of action within the meaning of the rule. The cause of action complained of and existing in the present case appears to me precisely the kind of mischief at which rule 58 [the English equivalent of our current R. 9.9] was aimed, its object being to prevent the necessity of bringing repeated actions in respect of repeated nuisances of the same kind. To adopt the argument of the Defendants would be to render the rule altogether a nullity. I feel no doubt that the present case is a continuing cause of action within the rule. It is a repetition of acts of the same kind as those which had been investigated at the trial, and had been decided to constitute a nuisance. The Judge was, therefore, right in treating it as a continuing cause of action, and in assessing the damages down to the date of the Chief Clerk's certificate.

[9] A recent case from the Alberta Court of Queen's Bench came to the opposite conclusion. In ***Wild Rose School Division No. 66 v. Bert Pratch Const. Co.***, 1998 ABQB 831 Mr. Justice Sanderman gave reasons for restricting the plaintiff to damages claimed in the statement of claim.

[10] In that case the claim was for "expense in the amount of $297,059.81 to repair and replace direct physical damage to property in the course of construction, installation, reconstruction, or repair." It is apparent from a reading of the decision that there were damages beyond those claimed but he refused to grant those additional damages.

[11] The case can be distinguished on two grounds:

1. It may be that counsel did not refer the Court to Rule 250, the predecessor of new Rule 9.9. Rule 250 reads as follows: Damages in respect of any continuing cause of action shall be assessed down to the time of the assessment.

2. The claim before Mr. Justice Sanderman was clearly a damage claim in the classical sense, and not a claim such as the one before me, where an additional condominium fee accrues on a month to month basis.

[12] In addition to the above reasons i.e., the reasons found in the Rules of Court, is the fact that in the prior application there is no mention, either in the written submissions or in the oral submissions of the claim being restricted to the arrears up to December 16, 2009.

[13] Accordingly the application for a variation of my judgment is dismissed. If an amendment is required in the circumstances it is granted, although I believe the circumstances indicate that the amendment is implied.

[14] Considering all of the circumstances of the matter, I will direct that each party bear their own costs of this application.

Heard on the 9th day of February, 2011.

Dated at the City of Edmonton, Alberta this 17th day of March, 2011.

W. Breitkreuz
M.C.C.Q.B.A.

Appearances:

Sandeep Dhir
Lindsey Miller
Field LLP
for the Plaintiff (Respondent)

Richard Cotter, Q.C.
Fraser Milner Casgrain LLP
for the Defendant (Applicant)