

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MONCTON

Citation: 2008 NBQB 250

MM 001208

Date: 2008/07/18

2008 NBQB 250 (CanLI)

BETWEEN:

ARC ACCOUNTS RECOVERY CORPORATION,

Applicant,

– and –

WESTMORLAND COUNTY CONDOMINIUM CORPORATION NO. 48,

Respondent.

DECISION

BEFORE: Mr. Justice Stephen McNally

AT: Moncton, New Brunswick

DATE OF HEARING: June 3, 2008

DATE OF FINAL
SUBMISSIONS: July 7, 2008

DATE OF DECISION: July 18, 2008

APPEARANCES: Edwin G. Ehrhardt, Q.C., on behalf of the Applicant
G. Robert Basque, Q.C., on behalf of the Respondent

MCNALLY, J.

- [1] The applicant, ARC Accounts Recovery Corporation ("ARC") is the owner of two units (units #29 & 30) in a condominium property located at 50 Assumption Boulevard in the City of Moncton. The respondent is the Westmorland County Condominium Corporation, No. 48, known as River Front Condominium, which is a thirty unit condominium development in which ARC's two units are located.
- [2] ARC purchased its two units on January 30, 2003. Unlike the other 28 units in the development, units 29 & 30 are not residential units and they do not include a designated parking space for the purposes of parking motor vehicles. ARC uses its two units for the purpose of carrying on its local business operation as well as to house its provincial head office. The manager of ARC has been using a parking space located in the common area of the condominium development designated for visitor parking to park his vehicle when he is working at ARC's office.
- [3] On January 30, 2008, River Front served ARC with written notice stating, inter alia,:

This letter is the board of directors' official notification that starting Monday, March 10, 2008, no local or visiting ARC employee or client will be allowed to park a vehicle anywhere on River Front Condominium's property. The board intends to step up its efforts to ensure that parking areas are used only by visitors to the residential units, or by vehicles providing required services to individual units. In due course, vehicles that are not considered admissible could be removed at the Owner's risk and expense.

The board understands and regrets the inconvenience caused by the withdrawal of this amenity. However, the board cannot endorse a privilege which should never have been offered by the former owner of units 29 and 30, nor accepted, albeit in good faith, by ARC.

- [4] By this application, ARC seeks a declaration of *“its rights with respect to the usage of the Common Elements, and more particularly the visitors’ parking area, by the Applicant and its employees.”*
- [5] ARC’s Agreement of Purchase and Sale, entered into with the vendor when it agreed to purchase the condominium units, purported to include “two parking spaces in front of building”. This agreement appears to have been with the developer of the condominium development and not with River Front. It is not clear what was intended or contemplated by this clause, however it is clear that ARC did not acquire any designated parking spaces with its purchase of units 29 & 30.
- [6] At the hearing, ARC did not seriously advance or pursue the position that it acquired parking rights to the visitor parking area located in the common area by virtue of its Agreement of Purchase and Sale with the developer. In any event, River Front was not a party to ARC’s Agreement of Purchase and Sale and there is no evidence to suggest that it consented to the terms purporting to grant ARC two parking spots in the common area of the development.
- [7] ARC’s purchase of the condominium units were subject to the terms of River Front’s Declaration of which ARC is deemed to have notice. It clearly provided that there were no designated parking spaces included with units 29 and 30, although designated parking was included with the other 28 units. Any agreement that ARC had with the vendor/developer purporting to designate two parking spaces in the common area to ARC is void and unenforceable against River Front.
- [8] ARC’s main submissions on the application are that River Front’s attempt to restrict its use of the visitor parking area, which is included in the common elements of the condominium property, contravenes the

provisions of the **Condominium Property Act**, R.S.N.B. 1973, c. C-16, as well as River Front's Declaration and its By-laws. Further, ARC submits that River Front's attempt to restrict ARC's use of the visitor's parking space by its manager is an unreasonable interference with its right as a unit holder to make reasonable use of the Common Elements of the condominium property.

- [9] The following are the provisions of the **Condominium Property Act** cited by ARC as being relevant to this application:

UNITS AND COMMON ELEMENTS

...

7(1) The owners are tenants in common of the common elements.

7(2) An undivided interest in the common elements is appurtenant to each unit.

7(3) The proportions of the common interests are those expressed in the declaration.

7(4) Subject to this Act, the declaration and the by-laws, each owner may make reasonable use of the common elements.

7(5) The ownership of a unit shall not be separated from the ownership of the common interest, and any instrument that purports to separate the ownership of a unit from a common interest is void.

...

RULES GOVERNING USE OF COMMON ELEMENTS

11(1) The by-laws shall provide for the making of rules by the owners respecting the use of the common elements for the purpose of preventing unreasonable interference with the use and enjoyment of the units and common elements.

11(2) The rules shall be reasonable and consistent with this Act, the declaration and the by-laws.

BY-LAWS

10(1) The corporation may, by a vote of members who own sixty-six and two-thirds per cent, or such greater percentage as is specified in the declaration, of the common elements, make by-laws

...

- (b) governing the use of units or any of them for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and other units;
- (c) governing the use of the common elements;

...

10(2) The by-laws shall be reasonable and consistent with this Act and the declaration.

...

16. This court's right to rule on issues relating to the condominium corporation are set out as follows in the Act:

...

23(1) Where a duty imposed by this Act, the declaration or the by-laws is not performed, the corporation, an owner, or a person having an encumbrance against a unit and common interest may apply to The Court of Queen's Bench of New Brunswick for an order directing the performance of the duty.

23(2) The Court may by order direct performance of the duty, and may include in the order any provisions that the Court considers appropriate in the circumstances.

[10] River Front's Declaration provides, with respect to Use of Common Elements that:

Subject to the provisions of the Act, this Declaration and the By-Laws, and any rules and regulations passed pursuant thereto, each Owner has the full use, occupancy and enjoyment of the whole or any part of the Common Elements, in common with all others entitled to the use thereof, except as hereinafter provided.

[11] Schedule "F" to the Declaration provides that:

Subject to the provisions of the Act, this Declaration, the By-Laws and the rules and regulations passed pursuant thereto:

...

(b) each Owner of Units 1 to 28 located on levels 2, 3, 4, and 5 of the building is entitled to the exclusive use and possession of one designated indoor parking space as designated by the number of his Unit and the

prefix "P" as shown on the Survey Plan Level A River Front Condominium filed herewith;

...

(h) each Owner may make reasonable use of, and has the right to occupy and enjoy the whole or any part of the Common Elements, subject to any conditions or restriction set out in the Act, the Declaration or the by-laws. However, no condition shall be permitted to exist, and no activity shall be carried on in any Unit or in the Common Elements that is likely to damage the Property or that will unreasonably interfere with the use or enjoyment, by other Unit Owners, of the Common Elements and the other Units;

[12] By-Law Number 1 of River Front Condominium provides the following with respect to usage of Common Elements:

Rules and Regulations Governing the Use of the Common Elements

...

2. Motor vehicles other than private passenger automobiles shall not be parked in any parking space within the common elements.

3. No motor vehicle shall drive on any part of the common elements other than on a driveway or parking space provided for the purpose.

...

[13] At River Front's annual general meeting on December 2, 2003, a copy of a Home Owner's Guide was circulated and a motion was passed to accept it. Section 7 of the Guide deals with parking, including visitors' parking, and states:

The outside parking area is **strictly for visitors** and for short term use of guests of the residents. **RESIDENTS SHOULD NOT PARK VEHICLES HERE OVERNIGHT.** Parking in front of the building is for Emergency use and for pick-up only. **DO NOT OBSTRUCT THE SIDEWALKS, ENTRY, AND DRIVEWAY. Unauthorized usage of the visitor parking area may result in costly vehicle removal.** [Emphasis included in original text]

[14] In its Pre-Hearing Brief, and oral submissions, River Front confirmed its reliance upon this purported amendment to its by-laws as the basis for its authority to prohibit ARC's manager from parking his vehicle in the visitors' parking area. It also relied upon the following resolution at

the Annual General Meeting of River Front on November 12, 2007, the intention of which was to force ARC to comply with the Visitor Parking directive provided in the Home Owner's Guide:

It is moved by Tony Hebert and seconded by David Radford that the Board be directed to uphold and enforce an Owner's rule that exterior parking spaces be reserved for the convenience of visitors to the residential units; that the Board advise Accounts Recovery Corporation (ARC), the owner of Units 29 and 30, that unless (sic) ARC provides to the Board, within 30 days, valid proof of purchase of parts of the common property as parking spaces, vehicles operated by employees of ARC will no longer be allowed to park on the property; that the Board arrange for the towing of delinquent vehicles if and when it deems necessary to do so.

[15] When pointed out that the resolution of November 12, 2007 was interpreting the Visitor Parking directive in the Home Owner's Guide much more broadly to now limit the use of common area parking to only visitor's of the residential units, counsel for River Front submitted that this was not the intention and that River Front is not now seeking to limit parking only to the visitors of the residential tenants. I note, however, that River Front's intention with respect to this resolution as stated by counsel at the hearing is at odds with what is stated in River Front's formal notice to ARC in its letter of January 30, 2008.

[16] Counsel for River Front submitted that as the various resolutions and guidelines adopted by River Front were not drafted by lawyers or legal draftspersons, they should not be interpreted by the court too strictly and the primary focus should be upon what was intended. Intention, however, is often difficult to determine and can shift from time to time as appears to be the case in this matter.

[17] I can appreciate River Front's position however, and acknowledge that to impose a requirement that lawyers or legal draftspersons be retained to draft every rule, regulation or resolution passed by River Front to govern the affairs of the complex may be too onerous and impractical in some instances and may also result in undue and unnecessary expense.

[18] Nevertheless, in my view, if River Front seeks to limit, or significantly alter, the rights of the tenants in the complex (rights that they have paid for when purchasing their units); in addition to satisfying all other relevant legal requirements, it must be done with a modicum of clarity and precision, such that the rules and regulations in question are not liable to become subject to undue arbitrariness, uncertainty or even discrimination in their application or interpretation.

[19] In saying this, I am not suggesting that River Front was in any way acting arbitrarily or in a discriminatory fashion towards ARC in the instant case. In fact, I am satisfied that at all times they were acting in good faith in their dealings with ARC. I am merely focusing on the principle that unless rules and regulations that limit or take away a party's rights are not subjected to a certain degree of rigour in their interpretation and meaning; a lack of clarity and precision can often lead to uncertainty, arbitrariness and discrimination in their application and enforcement.

[20] Having said this and turning to the matter at hand, in my view, contrary to River Front's position on this application, and particularly upon review of the Preamble to the Home Owner's Guide, it is apparent that its passage and adoption on December 2, 2003 was in fact, **not** intended to be an amendment to River Front's By-laws. The opening paragraph of the Preamble states:

WELCOME TO A CAREFREE LIFESTYLE.....This homeowner's guide has been prepared to introduce you to our condominium lifestyle, and to help you understand how it is administered for the mutual benefit of ALL owners. We hope you will find it a 'quick' reference, **but we must emphasize that it does not in any way take precedence over, or conflict with the Declaration, the Bylaws, or the Rules and Regulations, all documents with which you should become familiar.**
[Emphasis added]

[21] For ease of reference to owners, the Home Owner's Guide detailed the 14 Rules and Regulations included in Schedule "A" to River Front's

By-law No. 1. Rule & Regulation #2 of By-Law No. 1 deals with parking in the common areas and simply provides that: *“Motor vehicles other than private passenger automobiles shall not be parked in any parking space within the common elements”*.

[22] It follows therefore, that River Front cannot rely on the Home Owner’s Guide parking directive to restrict or limit ARC’s manager from parking his private passenger automobile in the visitor’s parking area of the common area of the condominium property. Further, neither the rules and regulations as presently constituted, nor the Declaration or By-laws prohibit him, or any tenant for that matter, from parking a private passenger automobile in the parking spaces within the common area or elements of the property.

[23] Similarly, due to its uncertainty and the admission by River Front that its resolution of November 12, 2007 River Front is not intended to mean what it clearly says, River Front cannot rely on it to limit ARC’s use of the visitor parking space by its manager.

[24] As the effect and extent of this ruling is that River Front has not established any valid basis, at this time, for restricting ARC’s use of the visitor parking area, it is unnecessary and would be inappropriate, in my view, for me to go further and opine whether or not, and to what extent, River Front might reasonably limit the use of tenant parking in its common areas by further amendment to its By-laws or Rules and Regulations.

[25] ARC is therefore entitled to a declaration that at present its manager’s right to park a passenger type automobile in what has been labeled as the visitor parking area located in the common elements of the condominium property cannot not be restricted or hindered by River Front on the basis of its Declaration, By-Laws or Rules and Regulations as

presently constituted. As ARC was successful on its application it is entitled to costs in the amount of \$750.00 together with taxable disbursements payable by River Front.

DATED at Moncton, New Brunswick, this 18th day of July, 2008.

STEPHEN J. MCNALLY
Judge of the Court of Queen's Bench of
New Brunswick

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