Court of Queen's Bench of Alberta

Citation: Calgary Jewish Academy v Condominium Plan 9110544, 2013 ABQB 134

Date: 20130304
Docket: 1201 03910
Registry: Calgary

Between:

The Calgary Jewish Academy

Plaintiff

- and -

The Owners: Condominium Plan 9110544

Defendant

Reasons for Judgment
of the
Honourable Madam Justice C.A. Kent

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[1] The Calgary Jewish Academy and the condominium complex are neighbours on land adjacent to Glenmore Trail. The Academy has run a school on the lands since 1958. It acquired a lease of lands next to the property it owns from the City of Calgary in 1978 when changes in Glenmore Trail cut off emergency access to the school. The leased land was for a parking lot and to provide that emergency access.

[2] The City sold the land next to the Academy to Statesman in 1989. Statesman developed the land as the condominium complex. Statesman and the Academy entered into a new lease on October 22, 1990. That lease was registered under the *Land Titles Act*, RSA 2000, c L-4 [*LTA*]. On March 19, 1991, after the condominium complex was constructed, the Condominium Plan was registered under the *LTA*. The Plan shows an area that is partially delineated by dotted lines and the letters P.A. That is where the parking lot is. The lease granted by Statesman was registered by way of caveat on each of the 16 individual condominium unit titles.

[3] Statesman wanted to have the lease registered against the Plan rather than the individual titles. It requested the Academy enter into a new lease to replace the existing lease. A new lease, dated March 25, was signed. The new lease was between the Academy and the Condominium Corporation. At the time, the only Board member of the condominium Corporation was Garth Mann, the President of Statesman. A unanimous owners resolution was signed by Mr. Mann on April 10, 1991. On April 16, 1991 this court granted an order allowing the new lease to be registered. The lease was registered against the Condominium Additional Plan Sheet of the plan and the caveats were discharged. Included in the documents that were registered was a letter from Mr. Mann certifying that the lease was approved by a unanimous resolution of the condominium corporation.

[4] The March 25, 1991 lease leases the property for 10 years, with an option for the Academy to renew for further periods of 10 years on the same terms and conditions. The rent is $1.00 per year. The Academy may only use the property for parking vehicles and for emergency access to the school. The lease gives the Academy the right to purchase the property for $1.00 subject to obtaining subdivision approval.

[5] In March, 1991, Statesman began selling units in the complex. The condominium complex filed three affidavits in this proceeding. Two are from two owners who purchased units. Margaret Francis signed a Sales Agreement on March 6, 1991 and it was accepted by Statesman on March 12, 1991. Ms. Francis deposited $10,000 on March 11, 1991. Ms. Francis says that she was never told of any lease with the Academy and she received an estoppel certificate that stated that there was no lease. Ms. Francis paid the balance of the purchase price and obtained keys to her unit on April 8, 1991. She says that she was not approached about the unanimous resolution signed by Mr. Mann.

[6] Arlene Smith signed a Sales Agreement on January 15, 1991 and Statesman accepted the offer on January 21, 1991. Ms. Smith deposited $5000 on January 23, 1991 and a further $40,600 on March 8, 2011. Paragraph 13 of the Agreement provided:

> The Purchaser expressly acknowledges and agrees that the title to the Unit, when transferred to the Purchaser, may be subject to a Caveat registered by the Calgary Jewish Academy as Instrument No. 891209466 or to another instrument registered by or on behalf of the said Calgary Jewish Academy and relating to the same or similar subject matters as set forth in the said Caveat.

[7] Ms. Smith's estoppel certificate stated: "We wish to advise (but not certify) for your further information only, that to the best of our knowledge and belief:"

> ... 9. The common property of The Condominium has not been transferred or leased and with the exception of implementing the By-Laws relating to the assignment of parking spaces and privacy areas to individual units, no resolutions

to transfer or lease the common property have been passed by The Corporation either pursuant to Section 41 of the *Condominium Property Act* or otherwise.

[8] The Academy asks for a declaration that the lease is valid and enforceable and the condominium corporation asks for a declaration that the lease is *ultra vires* the corporation and unenforceable.

[9] Section 40 of the *Condominium Property Act*, RSA 1980 c C-22 [*CPA*] read as follows:

(1) By a unanimous resolution a corporation may be directed to transfer or lease the common property, or any part of it.

(2) When the board is satisfied that the unanimous resolution was properly passed and that all persons having registered interests in the parcel and all other persons having interests, other than statutory interests, notified to the corporation

(a) have, in the case of either a transfer or a lease, consented in writing to the release of those interests in respect of the land comprised in the proposed transfer, or
(b) have, in the case of a lease, approved in writing of the execution of the proposed lease,

the corporation shall execute the appropriate transfer or lease.

(3) A transfer or lease executed in accordance with subsection (2) is valid and effective without execution by any person having an interest in the common property and the receipt of the corporation for the purchase money, rent, premiums or other money payable to the corporation under the terms of the transferor lease is a sufficient discharge of and exonerates the persons taking under th transfer or the lease from any responsibility for the application of the money expressed to have been received.

(4) The Registrar shall not register a transfer or lease authorized under this section unless it has endorsed on it or is accompanied by a certificate under the seal of the corporation stating:

(a) that the unanimous resolution was properly passed,
(b) that the transfer or lease conforms with the terms of it, and
(c) that all necessary consents were given.

(5) The certificate referred to in subsection (4) is,

(a) in favour of a purchaser or lessee of the common property, or part of it, and

(b) in favour of the Registrar,

conclusive proof of the facts stated in the certificate.

(7) On the filing for registration of a lease of common property, the Registrar shall register the lease by noting it on the condominium plan in the manner prescribed by the regulations.

[10] The condominium corporation makes four arguments for why the lease is not valid, one of which is compelling: the actions of the condominium board in signing the lease were *ultra vires*. The corporation argues that when the purchasers of the units executed real estate purchase agreements, they acquired an equitable interest in the property. S. 40(2) requires the board to be satisfied that all persons having interests in the property to approve the execution of the lease. That did not happen. As well, the lease is dated March 25. The resolution is dated April 10. On March, there was no authority to enter into that lease.

[11] The corporation cites *Condominium Plan No 8222909 v Francis*, 2003 ABCA 234. In *Francis*, a condominium board decided to rebate a portion of condo fees paid by units that bore their own utility and other costs, where the majority of the units did not bear those costs directly. The scheme was apparently designed to distribute the cost of condo fees equitably. A future condominium board decided the earlier board was not empowered to make such a decision, and renounced the plan. The Court of Appeal determined that the rebate was beyond the scope of powers granted to the condominium corporation pursuant to the *CPA*, and found the rebate invalid.

The court engages in a discussion of the powers of condominium corporations, finding that they lack the powers of a natural person, which are enjoyed by most business corporations: para 29. Ritter JA, at paragraph 35, concludes that once an act is *ultra vires*, laches and estoppel cannot legitimize the unauthorized act.

At paragraph 39, Ritter, JA considers the applicability of the indoor management rule and concludes that the rule does not apply to condominium corporations, because they are formed by statute. Of note, Ritter JA finds that the formalities required for an act to be binding on a condominium corporation grant some protection from obligations entered into by a developer while the developer controls the condominium corporation.

The decision in *Francis* is supported by the decision in *Condominium Plan No 992 5205 v Carrington Developments Ltd*, 2004 ABCA 243, 354 AR 371. At paragraph 9, the

Alberta Court of Appeal cites *Francis* and confirms that a condominium corporation lacks the powers of a natural person, having only the powers granted by the *CPA*.

In *Francis*, Ritter JA refers to the decision of *York Condominium Corp. No. 162 v Noldon Investments Ltd.*, [1977] OJ 300 (Ont SC). He declines to follow the case insofar as it deals with the indoor management rule, but does approve of that court's comments on the importance of formalities when the developer is in control. In *Noldon*, the court said at para 16:

> In the circumstances attendant upon the formation of a condominium, however, at a time when the developers are the sole members of the board of the condominium and are in a position essentially to contract with themselves and to subcontract to other related corporations, it is essential in the interest of the non-developer owners, present and future, that contracts of such a nature be attended by the proper formalities and made available to interested members of the public as required by the *Act*.

In response to that argument, the Academy says even though the purchasers of the condos had some interest in the properties they were purchasing, that was subject o the prior legal interest of the Academy. The Academy refers to subsections (4) and (5) or s. 40, which require the condominium corporation to provide a certificate saying that the formalities have been complied with and then says that the certificate is conclusive proof in favour of a lessee of the facts contained in the certificate. Thus, once the certificate of Mr. Mann was registered at the Land Title office, the lessee is entitled to rely on it and th lease is valid.

The Academy also argues that the condominium corporation now is estopped from repudiating its own certificate.

In response to the Academy's argument on s. 40, the corporation says that the certificate is simply not valid since the acts of the board were *ultra vires*.

The Academy began its submissions with the comment that no good deed goes unpunished, referring to the fact that it was at the request of Statesman that the original lease be replaced with the lease at issue here. Unfortunately, based on the provisions of the *Act*, that is the result of what happened. Simply put, the formalities were not complied with. The lease is dated well before the unanimous resolution was passed. Not all parties with an interest in the land consented in writing to the lease. What was done was *ultra*

vires the corporation. That makes it a 'nothing'. A certificate which itself is another formality cannot cure that.

After reserving on this application, I asked for further submissions on two issues, the first being whether the fact that the lease was signed before the unanimous resolution was passed was important. As can be seen above, in my view, it is. It was part of the *Ultra Vires Act*. The second was whether the wording at the beginning of s. 40 (2) - "when the board is satisfied" - somehow made the obligation to require compliance with the formalities less strict. Given the comments in *Francis* about the necessity for more vigilance when a developed is entering into contracts such as this, I cannot conclude that the board's obligation is reduced in any way.

Having found the lease invalid does not end the matter. The whole reason for this lease was in part to ensure emergency access to the Academy. The Academy still needs that access. At the beginning of argument, counsel for the corporation said that the corporation was prepared to enter into some sort of easement. The corporation must do that. I am directing the parties to attempt to work out an agreeable easement, failing which they should set a time with me to set a process to settle the terms of an easement.

Heard on the 19th day of December, 2012.
Dated at the City of Calgary, Alberta this 4th day of March, 2013.

C.A. Kent
J.C.Q.B.A.

Appearances:

Anthony J. Jordan
Gowlings LLP
for the Plaintiff

John M. McDougall
Scott Venturo LLP
for the Defendant