IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: CitiGroup Properties Ltd. v. Halifax County Condominium Corp. No. 54, 2006 NSSM 10

Date: 20060516
Claim: SCCH 263321
Registry: Halifax

Between:

CitiGroup Properties Limited

Claimant

v.

Halifax County Condominium Corporation No. 54

Defendant

Adjudicator: W. Augustus Richardson, QC

Heard: May 2, 2006 in Halifax, Nova Scotia.

Counsel: William C. Boyte, A/C, for CitiGroup Properties Limited, Claimant
Donovan Plumb, agent, for Halifax County Condominium Corporation No. 54

By the Court:

[1] This matter came on before me on May 2, 2006. I heard the evidence of Earl Munroe and Theresa Dawson on behalf of the claimant; and of Charles Metcalfe, Dale Hardy and Donovan Plumb on behalf of the defendant. Following the evidence and submissions I received further written submissions dated May 2, 2006 from Mr Boyte; and May 11, 2006 from Mr Plumb.

[2] This is a claim by a condominium property manager for one year's worth of property management fees from the defendant condominium corporation. The parties agree that the management fees in issue amount to $11,436.40.

[3] The claimant says that the defendant failed to give it proper notice of termination of the management contract between them. The defendant resists the claim on the grounds that the claimant property manager was in substantial breach of the agreement, thereby entitling it to terminate the agreement.

Background Facts

[4] Earl Munroe is and has been the general manager of the claimant ("CitiGroup") since 1987. CitiGroup provides property management services to multiple unit properties, whether office buildings, apartment buildings or condominium corporations. It currently manages roughly 5,500 residential units. CitiGroup hires individual property managers whose job it is to manage or supervise the management and operations of one or more multiple-unit buildings.

[5] In or about 1987 CitiGroup purchased Robertson Realty, which up until then had provided property management services to the defendant condominium corporation (known as "Mapleridge"). CitiGroup assumed those services.

[6] On March 14, 1995 CitiGroup formalized its relationship with Mapleridge, or perhaps entered into a new agreement, inasmuch as that is the date of the property management contract with Mapleridge that the parties agreed set out the terms of their relationship. Pursuant to the terms of the agreement CitiGroup agreed to manage most aspects of the operation and maintenance of the condominium corporation and its property. It agreed, *inter alia*, and by way of example, to "supervise and attend to the heating;" to "make or cause to be made and to supervise routine repairs;" to "hire, supervise, and dismiss all employees and other labour required for the security, operation, and maintenance of the Property;" and to furnish the Board of Directors of Mapleridge with estimated budgets: see clauses 4(d), (e), (f) and 5(c).

[7] The Agreement provided two clauses that dealt with the continuation or termination of the contractual relationship. Because these clauses form the basis of this dispute I will set them out here:

> 2(a) Subject to the overall control of the Corporation [*i.e.* the Mapleridge Board] and to the specific provisions hereof, the Corporation hereby appoints the Manager [*i.e.* CitiGroup] to be its sole and exclusive representative and Managing Agent to manage the Property upon the terms hereinafter set forth, for a period of one (1) year commencing the 1st day of January, 1995 and ending one the 31st day of December, 1995, and thereafter for annual periods unless on or before ninety (90) days prior to the expiration of any such renewal period, either party hereto shall notify the other in writing of an intention to terminate this agreement.

2(b) The Corporation shall have the right to terminate this Agreement upon serving at least sixty (60) days' prior notice of its election upon the Manager subject to the following:

(i) in the event that the Manager shall be in substantial breach of any terms or conditions of this Agreement, upon serving notice to that effect.

[8] The evidence called on behalf of Mapleridge was clear that for many years it was more than happy with the services being provided to it by CitiGroup under the terms of this agreement. However, the situation changed with the appointment by of Ms Teresa Dawson as Mapleridge's property manager.

[9] Ms Dawson has been a property manager with CitiGroup for roughly five years. Mapleridge is only one of her assigned properties. In all, she was responsible for over 500 residential units, comprising a total of seven condominium corporations and six residential rental buildings. Mapleridge was the smallest building (in terms of units) in her portfolio.

[10] Most of Ms Dawson's communication with Mapleridge's owners, its Board or its superintendent was via phone, email or written correspondence. I am satisfied on the evidence, which included her logs, Board minutes and email records that there were many such communications; and that she responded to all of them within a day if not more quickly. However, the Board's complaints focused in particular on the number of times a month that she was physically on the premises. Ms Dawson's records indicate that she was physically on the premises generally between one and three times a month. Setting to one side the issue of whether this number of site visits was an adequate discharge of CitiGroup's contractual responsibilities, it is clear from the evidence that Ms Dawson's approach to property management was *perceived* by the owners of Mapleridge to have been significantly different from that of her predecessors.

[11] Mr Plumb, the former president of the Board, stated that Ms Dawson was "very good with office based work," but he felt that she didn't attend the building in person often enough. Mr Metcalfe, another owner who had served on the Board in the past, focused on what he thought were her inadequacies as a project manager, and in particular, her failure to obtain proper and timely quotes from contractors. Whatever the particular problem, it is clear that enough of the board members and unit owners were concerned about what they felt were Ms Dawson's limitations that they called a meeting with Mr Munroe in June 2004 to express their displeasure with her services; and to ask that a new manager be assigned to their condominium.

[12] Mr Munroe acknowledged the complaints, but thought that Ms Dawson and the Board should be able to work through these difficulties. He expressed the belief that she would be "more than able to work these issues out." He was in any event reluctant to move Ms Dawson to another building, since he would then have to take another manager off another building, thereby risking that client's displeasure. He suggested that if things did not work out he would have been prepared to "revisit" the issue. At that point, however, he refused the Board's request to change her.

[13] Mr Munroe's hopes did not materialize, at least as far as the Board was concerned. As I understood Mr Plumb's evidence, the Board's concerns with Ms Dawson did not diminish over time. Eventually it was decided in the summer of 2005 to terminate the contract with CitiGroup. The board did not have a copy of the contract. It asked for one from CitiGroup. The evidence is clear that the Board (or at least Mr Plumb) did have a copy of it by the beginning of September 2005, if not before. He reviewed the contract. He was aware of the termination clause, and of the ninety day's notice required to prevent the contract from automatically renewing itself.

[14] Notwithstanding that knowledge, Mr Plumb and the Mapleridge Board did not want to give notice until they had completed their interviews of other potential property managers; and not before they were able to secure the agreement of the majority of the unit owners to the change. When asked why the Board did not give notice to CitiGroup in the summer of 2005, or at least by October 1st, 2005, Mr Plumb answered that they had not completed their interview process and arrangements by then. The board wanted to make sure that they had all the unit owners on side. It was not able to arrange a unit-owner meeting until after the deadline for the 90 day notice period under clause 2(a) of October 1st. Once the meeting was held, and the proposal accepted, the Board then gave its notice dated October 27th, 2005. The notice letter stated simply that Mapleridge would "not be renewing the Management Agreement ... for the upcoming year, commencing January 1, 2006:" letter dated October 27th, 2005, Exhibit C2.

[15] This notice did not comply with the provisions of clause 2(a)–and Mr Plumb and the Mapleridge Board knew that. Clause 2(a) required either party to give notice 90 days' prior to December 31st, which is in or around October 1st, not October 27th. Accordingly, the notice that Mapleridge gave was not in time to prevent the contract from renewing for another year under the provisions of clause 2(a).

[16] Nor was CitiGroup prepared to accept this notice as sufficient to prevent the contract from renewing. In a letter dated November 2nd Mr Munroe noted that the Board had failed to give the required ninety day notice of termination. He advised that CitiGroup's position was that

the contract "remains in full force and effect for 2006." The Board's only alternative was "to buy the contract out."

[17] The Board's response came in a letter dated November 14th. Mr Plumb acknowledged on behalf of the Board that it was late in giving the 90 day notice required under clause 2(a). It had hoped, however, that CitiGroup would be "flexible with this requirement and simply agree to terminate the agreement:" letter dated November 14th, 2005, Tab 4, Exhibit C2. Mr Plumb thereupon gave notice that the Board, rather than buy out the contract or accept its continuance for another year, was "electing to exercise our right under section 2(b) of the Agreement to serve you sixty (60) days prior notice subject to our claim that CitiGroup has been in substantial breach of terms and conditions of the Management Agreement:" *ibid.* There followed an enumerated list of several complaints about Ms Dawson's services and alleged shortcomings.

[18] CitiGroup did not accept the validity of these complaints; nor did it accept that the complaints, even if valid, were sufficiently "substantial" to trigger the provisions of clause 2(b). Mapleridge contracted with a new property manager. And CitiGroup commenced this claim.

The Issues

[19] It is clear on the facts that the Corporation gave less than the ninety days' notice required under clause 2(a) to prevent the Agreement from renewing for another year. The agreement thus renewed by its terms for another year (that is, for the year 2006) unless it was validly terminated by either of the two written termination notices. The question then becomes whether the condominium corporation was entitled or authorized by the provisions of clause 2(b) to terminate the Agreement. The answer to this question revolves around two issues:

a. What is the meaning of clause 2(b); and,

b. Was CitiGroup in "substantial breach of any terms or conditions" of the Agreement?

A: What is the Meaning of Clause 2(b)?

[20] It has to be said at the outset that both parties approached the case on the basis that clause 2(b) was to be construed as giving the Corporation the right to terminate the Agreement on sixty days' notice only in the event that CitiGroup was in "substantial breach" of the Agreement's terms and conditions.

[21] However, it appeared to the Court following the close of the hearing, upon reviewing the Agreement and clause 2(b) and 2(b)(i), that the issue of interpretation might not be quite so clear cut. For ease of reference, and to make this point clear, I set clause 2(b) out again:

> 2(b) The Corporation shall have the right to terminate this Agreement upon serving at least sixty (60) days' prior notice of its election upon the Manager subject to the following:
>
> (i) in the event that the Manager shall be in substantial breach of any terms or conditions of this Agreement, upon serving notice to that effect.

[22] The clause is not particularly clear, and seemed to this Court to be somewhat abmiguous. On the face of it clause 2(b) appears to provide the Corporation (but not the Manager) with more than one right of termination. The first right is the right "to terminate this Agreement upon serving at least sixty (60) days prior notice of its election upon the Manager." This first right then appears to be made "subject to" the provisions of clause 2(b)(i), which is triggered "in the event that the Manager shall be in substantial breach of any terms or conditions of this Agreement." In that case, the Corporation has the right to terminate "upon serving notice to that effect." In other words, clause 2(b)(i) provided the Corporation with the right to terminate the Agreement immediately upon giving notice that the Manager was in "substantial breach."

[23] The parties were advised of my concern regarding the possibility that clause 2(b) was ambiguous in an email dated May 3. I noted that if there was an ambiguity clause 2(b) might be read in one of two ways, as follows:

> a. the Corporation (but not the Manager) has the right to terminate on 60 day's notice unless there is substantial breach on CitiGroup's part, in which case it can serve a notice of termination effective upon service of that notice; or

b. the Corporation (but not the Manager) has a right to terminate on 60 days' notice in the event that CitiGroup is in substantial breach.

[24] Mr Boyte filed submissions dated May 8, 2006. They contained two principle arguments. First, the fact that both parties thought that clause 2(b) only dealt with a right to terminate on substantial breach was evidence that this was the only possible interpretation of the clause.

[25] Mr Boyte's second submission is that to interpret the clause so as to contain two termination clauses would lead to an absurd result. Mr Boyte submitted that if clause 2(b) was read to include two rights of termination, one on sixty days' notice and one for "substantial breach," it would render clause 2(a) redundant. As he asked rhetorically, "why ... would [the parties] have contracted for 90 days' notice [under clause 2(a)], if it was equally possible to terminate on 60 days' notice"?

[26] Mr Plumb had the opportunity to review Mr Boyte's submissions. He then filed submissions dated May 11, 2006 on behalf of the Defendant. He submitted that "given that both parties have held the same interpretation of the admittedly convoluted paragraph 2(b), you should proceed with your judgment based on the second interpretation of the paragraph that you outline in your email of May 3."

[27] Contracts are not normally interpreted on the basis of what the parties *think* the contract means. Rather, they are interpreted according to the words used in the contract. It is true that the conduct or practice of parties over time under an agreement can sometimes be taken as evidence of what they agreed to do, but that exception does not apply here. There was only one termination, not many.

[28] However, I interpret the submissions of Mr Boyte and Mr Plumb together to be, in effect, a submission that the parties have agreed that the meaning to be attributed to this clause is the one that both of them have submitted it has. And that is that clause 2(b), properly interpreted, means that the Corporation (but not the Manager) has a right to terminate on 60 days' notice in the event that CitiGroup is in substantial breach. In other words, there is no issue of interpretation to be determined by this Court. The parties have agreed as to its interpretation, and this Court's only task is to determine whether or not there has been a substantial breach by CitiGroup. I am accordingly not making any determination as to the true and proper construction of clause 2(b). Rather, I will accept that the parties have agreed that it is to have the meaning they have decided it has.

[29] I accordingly turn to the second issue.

B: Was There a Substantial Breach on the Part of the Property Manager?

[30] The question now becomes this: was CitiGroup in "substantial breach" of any term or condition of the Agreement so as to give the Corporation the right to terminate on sixty days' notice. If there was such a breach, then Mapleridge's notice (which was delivered more than sixty days prior to December 31st) was clearly appropriate to terminate the Agreement.

[31] Mr Boyte submitted that a "substantial breach" was the equivalent of a "fundamental breach." He submitted that as such, a "substantial breach" was one that was so material or substantial or fundamental as to amount to a complete failure of consideration. It was a breach going to the very root of the contract; it was one that destroyed the very substratum of the contract.

[32] I am not satisfied that a "substantial" breach is in law the same thing as a "fundamental" breach. In my opinion a breach can be "substantial" (as opposed to being minimal) without at the same time being "fundamental" (in the sense of destroying the very root or foundation of the contract). In my opinion there has to be room for a breach that is more than *de minimus*, but less than fundamental. This is particularly the case when dealing with service contracts such as the one here which covers a large number of different types of service. A service provider may be in breach of one of those terms, even substantially so, without being in breach of all of its obligations with respect to the other terms. For example, and in this case, a manager might be in breach of the obligation to deliver budgets, but not of the obligation to supervise the employees or provide heat.

[33] It is not, however, necessary for me to decide this particular point. Regardless of whether "substantial" breach means "fundamental" breach or something less than that, I am satisfied that the evidence does not establish that the property manager was in "substantial breach" of any term or condition of the agreement.

[34] The corporation could really point to only two concrete examples and one general example of what it said constituted "substantial" breaches of the terms or conditions of the agreement. One related to an allegation that Ms Dawson had not conducted an adequate survey of potential painting contractors; and did not adequately supervise the contractor that was hired. The other related to her opinion, apparently expressed to the Board, that damage caused by

power washing prior to the painting could not be laid at the feet of the spraying contractor. The more general complaint, expressed on a number of occasions, was that she failed to physically attend the property more than once or twice a month.

[35] The first complaint revolved around the work of the painting contractor that was hired by the Board, on the basis of a survey of bidders for the work that was performed by Ms Dawson. The Board was not happy with the work of the contractor that was eventually selected. The employees were slow; they did not work very hard or very quickly. But accepting that the painting contractor was substandard (or even in breach of *its* contract with the condominium) does not mean that *CitiGroup* was in substantial breach of *its* agreement. Ms Dawson did obtain a list of interested painting contractors: see Tab 9, Exhibit C2. Board. The Board had a chance to review the quotes and the contractors' qualifications. It did not have to accept any one of them. There was no evidence that the building had to be painted on an emergency basis; the Board could have waited another year if it was not happy with the proposed contractors. Nor was there any evidence that Ms Dawson knew that the painting contractor might prove to be substandard in practice.

[36] The second complaint had to do with water damage that occurred to one of the below-grade units during the course of some renovation work being performed on the building. Ms Dawson offered the opinion that the contractor (who employed a power-wash sprayer) could not be faulted inasmuch as below-grade units could be subject to leakage caused when water entered the ground and then found its water through the foundation into the units. Mr Plumb suggested that this opinion was wrong; and that in giving it Ms Dawson was in substantial breach of her (or rather CitiGroup's obligations) under the agreement. Once again, I do not agree. Her opinion that blame for water that entered the units through the ground (rather than, for example, through windows or doors) could not be placed on the contractor seems reasonable to me. Moreover, there is nothing in the agreement that requires CitiGroup to give correct legal advice regarding the legal liability, if any, of contractors to the corporation.

[37] There were a number of other vague complaints, all of which revolved essentially around the issue of "supervision," and, in particular, whether Ms Dawson was providing adequate "supervision" of the building and its operations. As Mr Plumb put it in his submissions, "we are claiming that because she did not visit our building often enough, and, when she did, did not provide diligent on-site service, it left our building improperly managed. Her failure to visit our building left her incapable of fulfilling key terms of the Management Agreement and, as such, exposed our building to unacceptable risks."

[38] Mr Boyte submitted that failure to attend the site physically or frequently could not constitute a breach of the contract. I do not agree. The contract imposes the obligation to "supervise" a number of activities and services on the property manager. In my opinion the word "supervise," when used in a maintenance contract involving residential property, includes an obligation to physically visit the site more than once or twice a month. The operations and maintenance of such property cannot be adequately "supervised" without a fair amount of physical, on-site attendance. Phone calls and emails are of course part of the "supervision" of a condominium, but such supervision is not limited to such communication. It must also include actual physical attendance.

[39] On the evidence it is clear, and I so find, that Ms Dawson did not physically visit the building as often as her predecessors. That may have constituted a breach of CitiGroup's obligation to "supervise" the corporation and its operations. However, I am also satisfied on the evidence, and so find, that any such breach did not constitute a "*substantial*" breach within the meaning of the Agreement. The evidence was clear and I so find that Ms Dawson did respond promptly to all phone calls and emails to her. She did attend at least a few times a month. Indeed, Mr Hardy, the building's superintendent, who was called to give evidence for the defendant, testified in chief that during the problems with the painting contractors Ms Dawson did attend "a few extra times" over and above her average number of visits. And as Mr Boyte effectively brought out in cross examination of the condominium's witnesses, Ms Dawson did perform all of the contractual provisions properly and promptly (subject to the complaints discussed above). I am accordingly satisfied on the evidence and so find that her conduct did not amount to a "substantial" breach of "any terms and conditions" of the Agreement. While the level and content of her "supervision" may not have met the Board's expectations, it did not fall so low as to constitute a "substantial" breach of CitiGroup's obligation to supervise the building and its maintenance.

[40] The onus of establishing a "substantial" breach is on the defendant. In my opinion it failed to satisfy that onus. It is unfortunate that it did not give notice under clause 2(a), given that it had decided at least by September 2005 if not before to terminate the agreement. However, having decided to hold off on giving notice under clause 2(a) until after the elapse of its right to do so, it was bound under clause 2(b) to prove that CitiGroup was in substantial breach of a term or condition of the agreement. In my opinion the evidence it submitted failed to establish such a breach.

[41] I accordingly allow the claim.

Dated at Halifax, this 16th day of May, 2006

Original: Court File)
Copy: Claimant)
Copy: Defendants)

W. Augustus Richardson, QC
ADJUDICATOR