Case Name:

Condominium Plan No. 992 5205 v. Carrington Developments Ltd.

Between
The Owners: Condominium Plan No. 992 5205
(Carrington Grande Whitemud), appellant
(Petitioner), and
Carrington Developments Ltd., Ken Ferchoff,
Dan Slaven, Jim Pepin and Melody Williams,
respondents (respondents)

[2004] A.J. No. 798
2004 ABCA 243
Docket No. 0203-0290-AC

Alberta Court of Appeal
Edmonton, Alberta
Conrad, Berger and Ritter JJ.A

Heard: January 27, 2004.
Judgment: filed July 8, 2004.
(19 paras.)

On appeal from the Whole of the Judgment of MacLean J., dated the June 13, 2002 and filed on July 19, 2002. Docket: 0003-08597

Counsel:

V.A. Archer for the Appellant

R.H. Kennedy and G.J. Thorlakson for the Respondents

MEMORANDUM OF JUDGMENT

¶ 1 **THE COURT**:— This appeal relates to a developer's sale of parking stalls which formed part of the common property of a condominium corporation. There are two issues in this appeal: (a) whether the sales violate the Condominium Property Act, R.S.A. 1980, c. C-22 (the "Act"), and (b) whether the developer breached his fiduciary duties by selling the parking stalls.

Background

¶ 2 The respondent Carrington Developments Ltd. "Carrington" is a land development corporation. Carrington designed a condominium project and later registered this project as Condominium Plan No. 992 5205 with the Land Titles Registry. This condominium plan delineated indoor and outdoor parking areas, however, Carrington elected not to register the outdoor parking stalls with separate titles.

Carrington also decided not to designate the outdoor stalls as common property areas reserved for exclusive use. Due to these two decisions, all thirty-two of the outdoor stalls became part of the general common property of the appellant Condominium owners ("Corporation").

¶ 3 Carrington intended to sell the outdoor stalls as extra parking. However, upon selling the living units, Carrington was unsure whether the thirty-two outdoor stalls should be sold as separately titled units or exclusive use areas. To address this uncertainty, the Purchase Agreements for each outdoor stall contained Clause 3. This clause states:

> I Understand that:
>
> ...
>
> (c) In the event THE VENDOR creates separate titles for the parking stall(s), THE VENDOR shall transfer the title to the agreed upon stall(s) to the Purchaser(s). In the event separate titles are not created THE VENDOR shall cause the Condominium Corporation to grant or assign exclusive use of the parking stall (s) in accordance with and subject to the provisions of the Condominium By-Laws and the Purchaser(s) shall not oppose any action taken by THE VENDOR or the Condominium Corporation in that regard.

¶ 4 In July 1999, Carrington decided to grant exclusive use of the parking stalls instead of re-subdividing the outdoor parking area to grant separate title. This decision was made to avoid the delay that would result from re-subdivision. At the time this decision was made, Ken Ferchoff, Dan Slaven, Jim Pepin and Melody Williams were employees of Carrington and also formed the interim Board of Directors for the Corporation. On behalf of the Corporation, these individuals signed the License for Exclusive Use of Parking (the "Exclusive Use Agreement") in which Carrington was granted exclusive use of the thirty-two outdoor parking stalls for a term of one hundred years at a cost of ten dollars per stall. Carrington then entered into separate Purchase Agreements with purchasers whereby the purchasers were granted exclusive use to an outdoor stalls for three thousand dollars.

¶ 5 At the hearing of this appeal, Carrington had granted exclusive use to sixteen of the outdoor stalls. Since all sixteen purchasers might be affected by this appeal, the panel directed that each of these individuals be given the opportunity to make submissions. A Notice, approved by the panel, was served on each of the purchasers and a deadline was set for reply. Service was perfected and the deadline for reply has passed. Fourteen of the purchasers chose not to appear. Two of the purchasers did not reply. The Notice indicated that by failing to reply, the purchaser is waiving the opportunity to make representations to the panel.

Chambers Decision

¶ 6 The chambers judge held that Carrington had a fiduciary duty and had discharged the resulting obligations by fully disclosing its intentions to prospective purchasers. The chambers judge found that Carrington had satisfied its fiduciary obligations by informing condominium purchasers that Carrington would exclusively control and profit from the sale of the outdoor parking stalls.

¶ 7 The chambers judge did not fully consider the requirements of the Act.

Analysis

¶ 8 We do not need to deal with the issue of fiduciary duty as the outcome of this appeal is determined by the correct interpretation and application of pertinent provisions of the Act.

¶ 9 A condominium corporation owes its existence to the Act and can only exercise the powers granted therein. Unlike a business corporation which enjoys the natural person powers provided by Alberta's Business Corporations Act, R.S.A. 2000, c. B-9, s. 16(1), a condominium corporation operates only within the powers granted by the Act: Condominium Plan No. 8222909 v. Francis, [2003] 11 W.W.R. 469, 2003 ABCA 234.

¶ 10 Carrington argues that the Exclusive Use Agreement was statutorily authorized by both ss. 40 and 41 of the Act.

Section 40 states:

(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.

¶ 11 Section 40 contemplates the transfer or lease of common property. The Exclusive Use Agreement does not constitute a "transfer" as contemplated by this section. The remaining subsections of section 40 show that a transfer must be capable of registration. Upon registration, a transfer grants separate title to the registrant. The Exclusive Use Agreement did not grant separate title to Carrington and therefore is not a "transfer".

¶ 12 We conclude that the exclusive use agreement is really a lease of common property. It grants exclusive use and enjoyment of the parking spaces for one hundred years. The Condominium Corporation continues to pay taxes and other costs associated with the parking stalls but divests itself of the usual rights of an owner: See: Strata Plan 1261 v. 360204 B.C. Ltd., (1995) 50 R.P.R. (2d) 62;Brockville (City) v. Dobbie , [1929] 3 D.L.R. 583 at 587 (Ont. C.A.); Glenwood Lbr. Co. v. Phillips [1904] A.C. 405 at p. 408.

¶ 13 However, under section 40, the "lease" is ineffective as Carrington did not comply with s. 40(2)(b) of the Act. The purchasers did not approve in writing the proposed "lease", nor did any others who had an interest at the relevant time. The approval in writing is a pre-condition to the execution of the "lease" by the Corporation. Although at the time of purchase, the purchasers approved a vague concept that might ultimately lead to a "lease", they did not approve the specific "leases" of the outdoor parking stalls.

¶ 14 Carrington also claims that the Exclusive Use Agreement was authorized by s. 41 of the Act. Section 41 provides:

Notwithstanding section 40, a corporation may, if its by-laws permit it to do so, grant a lease to an owner of a residential unit permitting that owner to exercise exclusive possession in respect of an area or areas of the common property.

¶ 15 The statutory authority of s. 41 is subject to s. 6(2) of the Act. Section 6(2) states:

If a plan presented for registration as a condominium plan includes residential units, that plan shall, in addition to meeting the requirements of subsection (1), delineate to the satisfaction of the Registrar the boundaries of the areas that are or may be leased under section 41 to an owner or a residential unit.

¶ 16 We find that s. 6(2) is determinative. Section 41 cannot permit the Exclusive Use Agreement as the condominium plan did not contain delineated boundaries: a prerequisite of s. 6(2). In a residential condominium, the boundaries must be delineated before the common property is leased. Carrington chose not to delineate the boundaries; as a result, it cannot lease the common property.

Conclusion

¶ 17 We find that ss. 40 and 41 do not authorize the Exclusive Use Agreement. A condominium corporation cannot exceed the authorization granted in the Act. Therefore, the Exclusive Use Agreement and the resulting Purchase Agreements are ultra vires.

¶ 18 If appropriate steps had been taken, Carrington could have avoided these proceedings. Judicial intervention would be unnecessary had Carrington either delineated the outdoor parking stalls when the condominium plan was registered or re-subdivided the outdoor parking area to grant separate title when the stalls were sold. Also, Carrington could have addressed the essential unfairness created by the fact that it received payment for the outdoor stalls but the Condominium Corporation is responsible for taxes on and maintenance of the stalls.

¶ 19 In the result, we allow the appeal. However, both the factums filed, and argument at the appeal hearing, lacked meaningful discussion of an appropriate remedy. We therefore direct the parties to submit written argument regarding remedy, with a limit of six pages each, within four weeks of release of this memorandum. Upon receipt and consideration of those arguments, the panel will fashion an appropriate remedy.

CONRAD J.A.
BERGER J.A.
RITTER J.A.

QL UPDATE: 20040709
cp/e/qw/qlmmm