Court of Queen's Bench of Alberta

Citation: First Calgary Savings & Credit Union Ltd. v Perera Shawnee Ltd., 2013 ABQB 613

Docket: 1001 03215
Registry: Calgary

Between:

First Calgary Savings & Credit Union Ltd.

Plaintiff

- and -

Perera Shawnee Ltd., Perera Development Corporation, Don L. Perera and Shiranie M. Perera

Defendant

And Between:

Perera Shawnee Ltd., Don L. Perera and Shiranie M. Perera

Plaintiffs by Counter-Claim

- and -

First Calgary Savings & Credit Union Ltd. and Deloitte & Touche LLP

Defendants by Counter-Claim

Memorandum of Judgment of the Honourable Mr. Justice G.C. Hawco

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[1] This is an application by Condominium Corporation No. 091 5321 (the "Condo Corporation") to lift the stay of proceedings as it relates to the project known as Highbury Residences developed by the Defendants Perera Shawnee Ltd. and Perera Development Group (collectively "Perera") which is currently under receivership. The Condo Corporation seeks to lift the stay of proceedings so that it may levy a contribution on those units presently held in the name of Perera. Perera has been placed in receivership pursuant to an application by the Respondent, First Calgary Savings & Credit Union Ltd. ("First Calgary"), which is a secured creditor of Perera.

[2] The Condo Corporation is seeking relief which would have the result of burdening the Receiver (and in the final result, First Calgary) with the entire bill for alleged remedial work to the Highbury project.

[3] Pursuant to section 39(1)(c), a Condominium Corporation may levy a special assessment against unit owners. That section provides:

> 39(1) In addition to its other powers under this Act, the powers of a corporation include the following:
>
> > (c) to raise amounts so determined by levying contributions on the owners
> >
> > > (i) in proportion to the unit factors of the owners' respective units,
>
> or
>
> > > (ii) if provided for in the bylaws, on a basis other than in proportion to the unit factors of the owners' respective units;

[4] It is conceded that the bylaws of the Condominium Corporation do permit that it may levy an assessment on a basis other than in proportion to the unit factors. The Receiver argues that a special assessment should not be levied on a basis other than an attribution of the unit, and not on the basis of the status of the unit holder. The issue before this Court is whether the Condo Corporation ought to be allowed to do so, in the circumstances which follow.

[5] Perera was a condominium real estate developer. The Highbury Project is a condominium development project located in the City of Calgary that was to be developed by Perera in three phases.

[6] Perera defaulted on loans provided to it by First Calgary to develop the Highbury Project. In consequence, First Calgary applied for and this Court appointed the Receiver on March 3, 2010, over all of Perera's assets, a significant portion of which is the Highbury Project. All proceedings against Perera were stayed pursuant to the Receivership order.

[7] Phase I construction was substantially completed when the Receiver was appointed. There are 70 residential condominium units in Phase I of the Highbury Project, 55 of which have been sold and conveyed to purchasers and 15 of which remain unsold in the control of the Reciever.

[8] Both Perera companies are bankrupt pursuant to bankruptcy orders granted on December 20, 2010. There has been no recovery of any amounts to First Calgary through the bankruptcies,

at a cost to First Calgary in excess of $59,000. The Trustee was discharged on December 19, 2012 and January 23, 2013 in respect of each of the Perera Defendants.

[9] First Calgary has funded all of the Receiver's certificates at a cost of $6,500,000 with recoveries from receivership of much less. As of September 4, 2013, the total amount that is owed to First Calgary by Perera, inclusive of recovery and its associated costs, is in excess of $34 million. It is anticipated that First Calgary will suffer a substantial shortfall once all recoveries are made of approximately $9 million.

[10] The end result of this is that First Calgary will suffer this loss no matter what now happens.

[11] The Condo Corporation retained a consultant to identify various deficiencies in the project. That consultant (Lawson Projects) has estimated it will cost $1.2 million to remedy what it describes as deficiencies. The Receiver takes issue with the characterization of the work remaining to be carried out. It claims that some of the "deficiencies" are unfinished work, general wear and tear, additional work which is over and above what the original construction plans called for, and a number of deficiencies. Thus, just what work needs to be done and who should be properly bear the cost are the issues.

[12] I believe the parties now agree that only the cost of that work which would be required to "properly complete" the project should be the issue.

[13] The Condo Corporation argues that any work involving the common property and the resultant cost of remedying any problem ought not to be borne by all of the unit holders. Rather, such work should be paid for by the party who caused the problem, which would be Perera.

[14] The Receiver takes exception to what that would be. It agrees that it will be responsible for the cost of completing the unfinished work, that is, work which is required to complete the project in the manner in which it was designed, once it is determined just what that is. It further agrees, I believe, that it will pay for the cost of carrying out any repair to the common property that is determined to be deficient, once again in accordance with the original plans. At this point in time the Receiver does take exception to what that work might be. It certainly does not agree with the consultant's report. I would therefore propose that an independent party, whom I would suspect would either be an engineer or architect, be retained to determine what does constitute either a deficiency or which work should have been completed by the developer pursuant to the original construction plans.

[15] That would leave the question of who should bear the cost of general wear and tear which has occurred, which, apparently, has been estimated at approximately $140,000 by the consultant. The second question is who should pay for the cost of repairing those deficiencies which have been estimated at between $240,000 and $550,000.

[16] The Condo Corporation argues that it would not be fair to all the other unit owners to have everybody share the cost of deficiencies and general wear and tear because these are costs which can be attributed directly to the developer's lack of care in the construction or lack of oversight. As such, the Condo Corporation argues, this is work which should fall within the nature of work dealt with by Master Smart of the Court of Queen's Bench of Alberta in

Condominium Plan No. 982 2595 v Fantasy Homes Ltd., 2006 ABQB 235. In that case, a developer failed to properly complete the construction of a condominium complex in Alberta. The condominium corporation there passed a bylaw levying a special assessment as against only the unit owned by the developer. That was allowed by Master Smart as it was determined that it was "fair and appropriate" under the circumstances. That matter was appealed to the Albert Court of Appeal. The Condo Corporation argued that the Court of Appeal chose not to address whether the special assessment against the developer was permitted, and allowed the appeal on other grounds.

[17] In fact, the Court (2010 ABCA 39, at para 32) said this:

> For purposes of this appeal, it is not necessary for us to determine whether the right to levy a charge against a condominium unit on other than an a proportionate basis can be invoked as here as against one owner's unit only when the charge is not related to the ownership of the condominium, but arises instead out of some independent cause of action that the condominium corporation may have against the owner based on the owner status and obligations as developer of the condominium project. The answer to this question raises serious issues of statutory interpretation and policy which we decline to determine at this time.

[18] It concluded at the end of that paragraph: "Of course, in the end, the question to be answered is whether the legislation intended that a regime of disproportionate allocation of levies apply to cases such as this."

[19] The Court went on to state, at para 33:

> Leaving this significant issue aside for the moment, the fatal flaw in the Master's reasons is his finding that there "appears to be misconduct" of Fantasy as a developer. But an "appearance" of misconduct alone is not sufficient to attach liability to Fantasy for purposes of validating its s. 39 caveat.

[20] In ***Condominium Plan No. 8210034 v King***, 2012 ABQB 127, Master Prowse considered both the decision of Master Smart and the decision of the Court of Appeal in ***Fantasy Homes*** and went on to say this:

> **25** In my opinion, the 2000 amendments to the Act allow a condominium corporation to pass a bylaw authorizing it to levy assessments against a particular unit for expenses incurred as a result of the conduct of that unit owner, such as collection expenses. There is no reason to limit the 2000 amendments to situations where the physical characteristics of the units mandate disproportionate assessments. If the conduct of one unit owner has led to increased expenses, why should that unit owner not be responsible for those expenses? Why should his/her neighbours in the complex have to pay them? There is nothing in the wording of the 2000 amendments which would require such an inequitable outcome.

[21] With respect, I am of the view that the Condo Corporation is taking far more from Master Prowse's decision than it ought to. Firstly, the only decision to which Master Prowse referred to

of conduct by a particular unit owner as a basis for disproportionate contributions was the ***Fantasy Homes*** decision, which was clearly overruled by the Court of Appeal.

[22] Secondly, Master Prowse has limited his finding that a condominium corporation may pass a bylaw authorizing it to levy assessments against a particular unit where the conduct of the unit owner in effect caused the expenses which were incurred, in that case, collection expenses.

[23] The Court of Appeal has made it clear, in ***Fantasy Homes***, that a minimum, of finding of misconduct would be required in order to entitle a condominium corporation to levy a disproportionate levy against a unit owner and to enforce payment in priority to the interests of secured creditors and others.

[24] As the Court of Appeal has said, in the end, the question to be answered is whether the legislature intended that a regime of disproportionate allocation of levies apply to cases such as this (where there had not been a finding of misconduct).

[25] In the end result, I am not satisfied that the reasoning in the ***King*** decision is at all applicable. There Master Prowse appears to be looking to the conduct of one unit owner, as a unit holder, which has led to increased expenses by the other unit holders. In this case, there is no finding of misconduct by Perera, nor, of course, the Receiver. The Receiver has agreed to look after any work which ought to have been carried out.

[26] The Condo Corporation could have made a claim against Perera for alleged defective work and, if successful, could have filed a claim in bankruptcy. A claim could have been made against the new home warranty program.

[27] I am simply not satisfied that the purpose of s.139(1)(c) of the *Condominium Property Act* is to enable the Condo Corporation to impose a disproportionate levy against the remaining Perera units, which would give them the right to become, in effect, a super-priority creditor over all secured creditors. For the reasons basically set forth by the Court of Appeal in ***Fantasy Homes***, I reject the Condo Corporation's claim.

[28] There has been no finding of misconduct on behalf Perera. Any misconduct which may have been attributable to Perera would not have been conduct of a unit holder as such. The charge sought to be levied in this case is not related to Perera's ownership of the condominium unit.

[29] There is no basis for surmising that "the Legislature intended that a regime of disproportionate allocation of levies [would] apply to cases such as this."

[30] To allow such a claim would cause an an unfair and disproportionate injury upon the Receiver and, ultimately, First Calgary. It would jeopardize a legitimate security position.

Heard on the 1st day of October, 2013.
Dated at the City of Calgary, Alberta this 17th day of October, 2013.

G.C. Hawco
J.C.Q.B.A.

Appearances:

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