Court of Queen's Bench of Alberta

Citation: Laakso v Condominium Corporation No. 8011365, 2013 ABQB 153

Date:
Docket: 1201 11662
Registry: Calgary

Between:

Darlene Laakso

Plaintiff

- and -

Condominium Corporation No. 8011365

Defendant

Memorandum of Decision
of the
Honourable Mr. Justice E.C. Wilson

Introduction

[1] The Applicant has an outdoor parking stall at her condominium (hereafter "Condo"). Essentially she alleges that the Condo Board of Directors have conducted themselves in an improper manner in their parking allocation and that the result has been both unfair and oppressive to her. She asks the Court to remedy this state of affairs that will result in her having the opportunity to exchange her outdoor parking stall for an indoor parking stall.

[2] I find that the Applicant has failed to prove her allegations. Accordingly, her claim is dismissed.

Facts

[3] On February 1, 2002, the Plaintiff purchased a Condo in the Defendant complex called the Westbow. That Condo came with its own outdoor parking stall which was specified in her Offer to Purchase.

[4] Some two weeks before the closing of her real estate purchase, she wrote a letter to the Condo Board of Directors. The salient portion said this:

> I would also like to make application for an indoor parking space. I am a single woman who lives alone and I feel that the personal safety factor is greatly increased with an underground parking space. I have one vehicle only. I also occasionally work late, which is also a concern.

[5] One week later, the Board responded to that request in writing:

> To answer your question regarding parking, we are unable to make any changes to the parking assignments. These are the stalls that have been assigned, specifically to each suite at the time the building was built. All owners are aware of the stall they are assigned with their suite at the time of purchase. Having said this, if an owner does not use their indoor stall or is willing to trade stalls, you may do this between yourselves. We would suggest leaving a note by the mailboxes to see if any owners are interested. Of course this would be an informal agreement between the owners and upon the sale of either suite, the parking will immediately return to its original assignment.

[6] The Condo bylaws included bylaw 58 which is headed **Balconies and Parking Spaces** and, in its material part, reads as follows:

> The Board shall assign and designate an area of the common property for the exclusive use by the owner of a unit for the sole purpose of parking one private passenger automobile thereon. Until the Corporation otherwise resolves by special resolution, the owner, his heirs, administrators, successors and assigns shall have the exclusive use of the Parking Space described in the Offer to Purchase between the Developer and such owner...

[7] Clearly, the Plaintiff would have preferred to have an indoor parking space when she purchased her condo but her request was turned down by the Board for the reasons stated which, in turn, reflect the terms of bylaw 58 which had been passed some 20 years before the Plaintiff came on the scene.

[8] It should also be noted that one of the conditions of her Offer to Purchase was that she be provided with, *inter alia*, all the bylaws of the Condominium Corporation.

[9] The Plaintiff admitted at questioning that she had read them and that she had then provided a written waiver of that condition, thereafter completing her purchase.

[10] I find as a fact that prior to closing the Condo purchase, she was fully aware that her condo came with only an above ground parking stall and that the only possible way that she might be able to obtain an indoor stall would be through private agreement with another condo owner or, pursuant to bylaw 58, by way of a special resolution of the Condo owners.

[11] Being fully aware that her wishes were not being met the Plaintiff, nevertheless, closed on her deal.

[12] Some nine and one-half years later, the Plaintiff together with some other owners retained counsel, who, on their behalf, wrote to the Condo Board requesting that the existing parking assignment system be varied. If a resolution satisfactory to Counsel's clients was not obtained, legal action was threatened.

[13] As required by the Condo bylaws, the Board sought the authority of condominium owners by special resolution to vary the parking assignment system. The special resolution failed to receive the required 75% approval and thus did not pass.

[14] This application was subsequently filed.

[15] The Plaintiff explained her reasons for bringing this application in para 11 and 13 of her Affidavit sworn September 7, 2012:

> 11. However, the owners of underground parking spaces reap several benefits not experienced by owners assigned aboveground parking spaces:
>
> a) Protection from weather-related damage, including hail and debris;
>
> b) Protection from weather-related inconvenience, including removing snow and ice from vehicle and needing to wash the vehicle more frequently as a result of dirt and dust accumulating;
>
> c) Security cameras and controlled access which protect from theft and vandalism; and
>
> d) The underground parking area is heated and has better lighting.
>
> 13. I feel I should be entitled to an equal opportunity to the use, enjoyment and benefits of an underground parking unit as all other owners.

[16] Her described benefits and uses of an indoor parking stall are self-evident and would have been known and understood by the Plaintiff prior to her closing the purchase. But, clearly, the fact that she knew that she would not be enjoying these benefits did not dissuade her from closing the purchase.

[17] The evidence before me also includes the financial value of indoor or underground versus aboveground parking stalls.

[18] Condo owner John Peters' affidavit reveals that when he purchased his Condo unit – as one of the original purchasers – his choice to acquire exclusive use of an underground parking stall came at a $1,500 additional cost to the condo purchase price.

[19] The uncontradicted affidavit of an appraiser – Janet Aspinall – is instructive. Based upon all of her identified sources, it is her opinion that the market value of an indoor (or underground) stall is $10,000 above the value of a surface stall.

[20] I find as a fact based upon the foregoing and with regard to the very benefits of underground parking identified by the Plaintiff, that since its inception, residential units at this Condo complex with permanent underground or indoor parking stalls have a higher market value than comparable residential units with permanent surface parking stalls. The undeniable inference is that a higher price was and is paid for a Condo with indoor parking than for a condo with surface parking, like the condo unit the Plaintiff purchased. The Defendant points out that the Plaintiff is, in effect, seeking to obtain something at no cost to herself notwithstanding that her neighbours had to pay an additional cost to obtain the same thing.

Issue

[21] Does the condo parking allocation contravene section 67 of the *Condominium Property Act* [*C.P.A.*] RSA 2000, c. C-22?

Discussion

[22] The Plaintiff contends that the parking allocation contravenes the legislation and supports her contention with the two broad, but related, submissions.

[23] The Plaintiff's first submission is clearly expressed in her Originating Application at paras 10-12:

> 10. The application of the Westbow's By-laws with respect to the assignment of parking results in the Westbow's business affairs being conducted in a manner that is oppressive, unfairly prejudice and unfairly disregards the Plaintiff's interests.
>
> 11. The Westbow's board of directors has exercised its power in a manner that is oppressive, unfairly prejudices and unfairly disregards the Plaintiff's interests.
>
> 12. The Westbow's By-laws are invalid to the extent that they perpetuate an unfair system that does not allow all unit owners an equal right to use common property.

[24] These allegations, if proven, are the types of "improper conduct" identified by section 67(1)(a) of the *C.P.A.* which would permit judicial intervention.

[25] Counsel are agreed that section 67 of the *C.P.A.* is similar to corporate oppression provisions and accordingly, have attracted courts to apply corporate oppression principles to this legislation. See *934859 Alberta Inc v Condominium Corporation No. 0312180*, 2007 ABQB 640, paras 73 *et seq.* I am satisfied to do the same.

[26] That being the case, a two-pronged approach in analysing the oppression remedy is required. The decision of *Metropolitan Toronto Condominium Corporation No. 1272 v Beach Development (Phase II) Corporation* [2010] O.J. No. 5025 (OntSupCt of Justice) is helpful in this regard. Two paragraphs are reproduced here:

> 13 In *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, the Supreme Court held that the best approach to analyzing the oppression remedy is a two-pronged test. At the first stage, the Plaintiffs must establish a breach of reasonable expectations. If successful, the court must go on to consider whether the conduct complained of amounts to oppression, unfair prejudice or unfair disregard.
>
> . . .
>
> 19 The concept of reasonable expectations is objective and contextual, taking into account the facts of the specific case, the relationships at issue and the entire context. The actual expectation of a particular stakeholder is not conclusive. The Plaintiff must identify the expectations that were allegedly violated and establish that those expectations were reasonably held, based on factors that may include general commercial practice, the nature of the corporation, the relationship between the parties, steps that the claimant could have taken to protect itself, the fair resolution of stakeholders' conflicting interests and, importantly, representations and agreements.

[27] The earlier description of the facts and my findings in relation thereto clearly establish that there can be no breach of the Plaintiff's reasonable expectations regarding indoor versus outdoor parking stalls. The Plaintiff had received full disclosure of the parking allocation, knew that she only had an outdoor parking stall and proceeded to close on her purchase fully aware of that situation. Indeed, even prior to closing, she sought some type of informal dispensation that would have varied the parking arrangement but, after being rebuffed, she still proceeded to close upon her purchase.

[28] I find that she knew precisely what she was bargaining for and she received precisely what she had expected.

[29] Notwithstanding that the Plaintiff fails to establish her case on the first prong of the test I will, nevertheless, address the second prong.

[30] As a general observation, I do not accept the contention that the Plaintiff knowingly bought into what is now alleged to have been an oppressively or unfairly operated Condominium or parking allocation scheme.

[31] Bylaw 58 contains within its terms a method by which parking allocation can be altered in a democratic fashion by way of a special resolution.

[32] The Plaintiff and others triggered that process but the required 75% support of the owners was not given.

[33] Losing a properly constituted voting proposal does not result in the creation of an oppressively or unfairly operated condominium or parking allocation scheme.

[34] But the Plaintiff steps around this problem by arguing that bylaw 58 itself and subsequent Condo Board Resolutions have, all along, failed to comply with the requirements of the *C.P.A.* I will now address this argument.

[35] It is clear that some of the parking stalls were originally allocated or confirmed by the January 9, 1981 Resolution of the Condo board passed pursuant to bylaw 58. That Resolution reads as follows:

> THE MOTION DULY MADE AND SECONDED IT WAS UNANIMOUSLY RESOLVED that until the Board of Managers otherwise decide or elects the following area are hereby designated as exclusive use areas pursuant to By-Law 58 and such areas are hereby assigned to the owner of a unit adjoining such area:
>
> (a) Any balcony immediately adjacent to the owner's unit to which he has sole access;
>
> (b) The Board of Managers hereby confirms that all parking stalls assigned or designated in the individual Offers to Purchase executed by Nu-West Group Limited and the respective Purchasers are deemed to be assigned parking stalls pursuant to By-Law 58, the numbers of the units and the corresponding stalls assigned thereto set forth in Schedule "A" attached to these minutes.

[36] Counsel pointed out that this special resolution, and more particularly Schedule "A" to the minutes, contains a number of deficiencies. In the result, counsel submitted that this parking resolution was never appropriately done.

[37] The first deficiency in Schedule "A" occurred when two units, including the unit which was purchased years later by the Plaintiff, were assigned the same parking stall – #102. I am satisfied that this was a simple typographical error as seems confirmed by the fact that when the Plaintiff purchased her condo the assigned stall for her unit was #103.

[38] The second deficiency pointed out by counsel is that Schedule "A" is simply incomplete. Not all condo unit numbers are listed nor are all parking stalls listed. However, I agree with Defendant counsel's interpretation of what has occurred. It is simply this. At the time of the passing of the resolution, not all of the units had been sold. Hence, not all of the parking stalls had been assigned. In the absence of any other answer, I find this to be the only plausible explanation. In the result, I find there is no deficiency. The Schedule simply reflected the reality at the time.

[39] The Plaintiff further contends that the purported allocation of the parking stalls within the January 1981 resolution and bylaw 58 contravenes section 50(1) of the *C.P.A.* which states:

> 50(1) Notwithstanding section 49, a corporation may grant a lease to an owner of a unit permitting that owner to exercise exclusive possession in respect of an area or areas of the common property.

[40] The Plaintiff argues that neither the bylaw nor the January 1981 resolution constitutes a lease, yet both grant exclusive possession of an area of common property.

[41] The Defendant's response is that exclusive use of common property is not given solely by the leasing provisions of section 50 of the *C.P.A.*

[42] The other method is by way of a revocable license, i.e., a revocable exclusive use of common property which lies solely within the authority of the Condo board. See Master Hanebuy's decision in *Langagar v Condominium Plan No. 7621302*, 2007 ABQB 793 at para 16.

[43] Counsel for the Plaintiff did not challenge Master Hanebury's decision nor the specific comment contained within paragraph 16 thereof:

> Counsel advised that to sidestep the requirements of s. 50 of the Act, the practice of condominium boards has been to give revokable licences.

[44] I accept that this is an accurate statement of affairs in 2007 and it continues to this day. I am satisfied that the parking allocation here is by way of a revokable licence - not by way of a lease. Counsel for the Defendant offers the following submission with which I entirely agree:

> One must consider the realities of condominiums. It should be noted that other areas of common property are assigned to owners as exclusive use common property in this project, specifically exterior balconies. If exclusive use of common property is prohibited unless leases are granted pursuant to Section 49 or Section 50 of the *Condominium Property Act*, then the same principal would apply to exterior balconies which, of course, leads to an absurd result. In addition, if equal entitlement to common property is absolute, then does it follow that a parking stall in the far reaches of the underground parkade is less desirable than a parking lot next to the elevator, or that a bigger parking

> stall is better than a smaller parking stall, and an owner having assigned a distant or smaller parking stall may impeach the assignment on the basis of improper conduct?

[45] Bylaw 58, which includes the procedure whereby parking allocation may be changed, does not contravene the *C.P.A.* By definition then, the actions of the Condo board which are consistent with bylaw 58 do not constitute improper conduct. This is unlike the situation in *Wright v. Condominium Plan No. 7711582* (1994) 22 Alta LR (3d) 139 9Q.B. where the Board had a parking allocation policy which it ignored.

[46] If I am wrong in finding there is a revokable licence, I turn to further consider the application of s. 50(1) of the *C.P.A.*

[47] Clearly, the word "lease" is not to be found in either the bylaw nor the January 1981 resolution. But while that is not stated explicitly, surely it could be contended that that is the real effect of the Resolution.

[48] Such an interpretation would be supported by the authority relied upon by the Plaintiff: *Condominium Plan No. 992 5205 v Carrington Developments Ltd*, 2004 ABCA 243. In that case, the court examined a condition of a Condo unit purchase which dealt with the exclusive use of a parking stall and interpreted it as follows:

> We conclude that the exclusive use agreement is really a lease of common property. (para 12)

[49] Presuming then that such a parking allocation was by way of a "lease", the Plaintiff submits that the said "lease" is in violation of section 8(1)(i) of the *C.P.A.* which reads:

> 8(1) Every plan presented for registration as a condominium plan shall:
>
> (i) where in accordance with section 50 an owner may be permitted to exercise exclusive possession in respect of an area or areas of common property, delineate to the satisfaction of the Registrar the boundaries of the area of common property over which the owner may be permitted to exercise exclusive possession,

[50] The alleged violation has two components to it.

[51] The first is that the parking stalls are not specified to be within an area of common property. I disagree. Exhibit "C" to the Plaintiff's affidavit is the Condominium Plan. One of the Notes on the Exhibit at page 1 states "All areas not designated by a unit number are common property (Balconies are common property)".

[52] The Exhibit pages showing the parking stalls have no unit numbers associated with them. Hence, by definition, they are areas of common property. The Plaintiff's submission to the contrary must be dismissed.

[53] The second component of the alleged violation of section 8(1)(i) of the *C.P.A.* is that the parking stalls are not sufficiently delineated as they are only marked on three sides. With respect, this is not problematic at all. The reason that the "fourth side" is not delineated is because it is the opening upon the common area laneway which much be travelled by a driver in order to access or exit his/her parking stall.

[54] In the result, presuming that section 50 of the *C.P.A.* is at play, I find there is no merit to the claim that the bylaw and January 1981 Resolution have been and continue to be in non-compliance with the *C.P.A.*

Conclusion

[55] The action is dismissed. If the parties cannot agree upon costs, I will deal with that matter solely by way of written materials to be filed with the Court within thirty days of the release of these reasons.

Heard on the 1st day of March, 2013.
Dated at the City of Calgary, Alberta this 12th day of March, 2013.

E.C. Wilson
J.C.Q.B.A.

Appearances:

Roxanne M. Davis
(Stones Carbert Waite LLP)
for the Plaintiff

Jamie E. Polley
(McLeod LLP)
for the Defendant